Nos. 115–116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA,
Petitioner

v.

WILLIAM R. JOHNSON

THE UNITED STATES OF AMERICA,
Petitioner

v.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY and STUART SOLOMON BROWN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS.

HOMER CUMMINGS,
Attorney for William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, Respondents.

WILLIAM J. DEMPSEY,
Attorney for William R. Johnson, Respondent.

HAROLD R. SCHRADZKE,
Attorney for Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, Respondents.

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BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the circuit court of appeals (AR. 207) is reported in 149 F. 2d 31.

JURISDICTION.

The judgments sought to be reviewed were entered May 2, 1945 (AR. 237). The petition for writs of certiorari was filed June 6, 1945, and was granted October 8, 1945 (AR. 239). The jurisdiction of this Court rests on Section

240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court on May 7, 1934.

STATEMENT.

On March 29, 1940, an indictment was returned against the respondents and others (1 MR. 2-25).[1] The first four counts charged the defendant Johnson with wilful attempts to defeat and evade a large part of his income taxes for the calendar years 1936-1939, inclusive, and charged the co-defendants with wilfully aiding and abetting, etc., Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy (*United States* v. *Johnson*, 319 U. S. 503, 505-506).

Conviction and Review.

After a trial lasting more than 6 weeks, from August 27 to October 12, 1940 (2 MR. 1, 3 MR. 152), respondent Brown was found guilty on the last three counts. The other respondents were found guilty on all five counts. Johnson was sentenced to imprisonment for five years on each of the first four counts and two years on the fifth count, all to run concurrently; he was fined $10,000 on each count with a provision that payment of one $10,000 fine should discharge all fines. The other respondents were given lesser sentences and fines (R. 462).

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[1] References to the printed records are as follows:

The original printed record on review of respondent's convictions Nos. 4 and 5, O. T. 1942: ..... MR....., indicating volume and page.

The printed record on petition for certiorari (dismissed) to review judgment of the Circuit Court of Appeals affirming order denying original motion for new trial Nos. 153 and 154, O. T. 1944: R.....

The printed record of the additional evidence and proceedings on the amended motion for new trial: AR.....

The Circuit Court of Appeals for the Seventh Circuit reversed on the ground that the legal life of the grand jury had expired prior to the return of the indictment. *United States* v. *Johnson*, 123 F. 2d 111 (September 15, 1941).

On writs of certiorari granted February 2, 1942, after argument April 10, 13, 1942, and reargument on October 12, 1942 (at this Court's order May 4, 1942, addressed solely to the question of sufficiency of the evidence) this Court on June 7, 1943, entered its judgment reversing and remanding the causes to the circuit court of appeals "for proper disposition in accordance with this Court's opinion." *United States* v. *Johnson*, 319 U. S. 503.

Proceedings for New Trial.

First remand.—On motion of the defendants and over objection of the Government, the circuit court of appeals remanded to the district court to permit motion for a new trial (R. 9-10).[2]

First motion for new trial.—Motion for new trial was filed in the district court on October 29, 1943 (R. 12).[3] The district court, after argument, filed an opinion concluding that the motion should be denied (R. 460-516) and entered its order accordingly (R. 534-536).

The circuit court of appeals filed an opinion (R. 578-586) holding the trial court had not abused its discretion and entered judgment of affirmance accordingly May 6, 1944 (R. 586).

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[2] Mr. Justice Frankfurter's order of denial of stay of mandate pending petition for rehearing was specifically stated to be "without prejudice, however, to the consideration and disposition by the United States Circuit Court of Appeals for the Seventh Circuit of any motion filed under Rule 2(3) of the Criminal Appeals Rules" (R. 10).

[3] A complete analysis of the grounds of the motion and of the evidence upon which it was based is set out in the defendants' brief in support (R. 19-34).

Respondents filed a petition for certiorari (Nos. 153 and 154, 1944 Term) which the Government opposed.

On motion of respondents, this Court deferred consideration of the petition conditioned upon the prompt filing in the Circuit Court of Appeals for the Seventh Circuit of a motion to reopen proceedings on the motion for new trial and until the disposition of that motion (AR. 18-19).[4]

Second remand.—The circuit court of appeals, on November 16, 1944, on motion of defendants and over objection of the Government, vacated its order affirming the order of the district court denying defendants' original motion for new trial and remanded to the trial court (AR. 18-19). The pending petition in this Court having thus become moot, it was dismissed on motion of counsel for the defendants (323 U. S. 806).

Amended motion for new trial.—The district court, on motion, required the United States to make available the tax returns of Theodore Goldstein (AR. 26). Respondents then filed an amended motion for new trial (AR. 28-34) in which the record on appeal from the trial court's denial of defendants' original motion for new trial was made an exhibit and incorporated by reference (AR. 29). There was thus included in the amended motion for new trial the original motion for new trial with all its supporting affidavits. Respondents also relied on the fact that the returns of Theodore Goldstein procured and filed by William Goldstein, discovered while the case was pending in this Court demonstrated not only that the latter had testified falsely at the trial with respect to the purchase of the Albany Park

[4] On October 3, 1944, at the request of defendants the Solicitor General filed with this Court a Supplemental Memorandum in which he admitted that Goldstein, the Government witness whose testimony is under attack, had filed income tax returns on behalf of his son in which the latter had reported as his income and claimed as deductions, respectively, the income and expenses including depreciation of a building which Goldstein at the trial had testified he had bought for Johnson with money given him by Johnson, with title being taken in his son's name and by the latter deeded to Johnson (Gov't App'x A, p. 120).

Bank Building but showed as well that his affidavits filed by the Government in opposition to the original motion for new trial contained deliberately false statements (AR. 33, 47-74).

The trial court, after argument, filed its opinion holding the rule of law governing consideration of the case to be that stated in *Berry* v. *State*, 10 Ga. 511, and entered its order denying the motion (AR. 133, 171).

The trial court made no reference to the rule formalized in *Larrison* v. *United States*, 24 F. 2d 82, 87 (C.C.A. 7),[5] and now acknowledged by the Government to be applicable to motions for new trial based upon a showing of false testimony (Br. 83).[6]

On the appeal from the order denying the amended motion for a new trial the circuit court of appeals, holding inapplicable the rule of *Berry* v. *State*, *supra*, expressly accepted as controlling by the trial court, and holding the rule in *Larrison* v. *United States*, *supra*, to be applicable, carefully considered under that rule all the evidence including the affidavits presented on the first motion and the income tax returns and affidavits submitted for the first time in support of the amended motion for new trial. It held (AR. 225):

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[5] The rule as thus stated by the Seventh Circuit in that decision is as follows:

"* * * a new trial [because of false testimony] should be granted when

(a) The court is reasonably well satisfied that the testimony given by a material witness is false.

(b) That without it the jury *might* have reached a different conclusion.

(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not learn of its falsity until after the trial."

[6] The Government contends now that the rule is not applicable except in cases of recantation or where the evidence of false testimony is "clear and convincing". It overlooks the fact that in the *Larrison* case where the rule was formulated the evidence of perjury was found to be insufficient, the court holding that the rule required denial rather than granting of the motion, but that the legal basis for evaluating the evidence was to be found in the rule without regard to whether the ultimate conclusion was to grant or deny.

> "In our considered judgment Goldstein testified falsely at the trial and has been so thoroughly discredited that his affidavits offered in opposition to the motion for a new trial carry little, if any, weight. Proof therein contained affords no substantial support, for a finding that he testified truthfully at the trial."

And it concluded (AR. 227):

> "It is our conclusion that the proof offered in support of the original and amended motion, with the attending circumstances, *unerringly* points to the fact that Goldstein's trial testimony was false. The finding of the trial court to the contrary was, in our judgment, *an abuse of discretion*." (Emphasis supplied.)

Applying the rule of the *Larrison* case the court found all of the requisites thereunder to be present. Its careful opinion also sustains its holding that there was no lack of diligence (AR. 230)[7]

Facts Upon Original Trial.

The facts developed upon the trial of these cases are set out in the briefs filed in this Court in Nos. 4 and 5, 1942 Term, particularly the briefs on reargument. We will not in this brief again set those facts out at length. For convenience, however, the contentions based upon them will be stated.

Government's theory.—The Government charged defendant Johnson with being the real owners of the D & D Club operated by the co-defendant Kelly, the Horseshoe and the Dev-Lin operated by defendant Sommers, and the Harlem

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[7] In closing, the circuit court of appeals also noted the error of the trial court involved in rejecting the evidence as cumulative because it went to matters as to which there was evidence at the trial (AR. 166). In so doing it emphasized that even under the rule of *Berry* v. *State*, 10 Ga. 511, purportedly applied by the trial court, evidence in support of a new trial is rejected on that ground only where it is *merely* cumulative.

Stables and the Lincoln Tavern operated by defendant Hartigan. Johnson denied owning these gambling clubs, and Kelly, Sommers, and Hartigan, respectively, claimed to be the owners as well as the operators of them (2 MR. 462; 3 MR. 809-811, 812, 878, 887). Defendant Brown operated a currency exchange in the Albany Park Bank Building which was patronized by Kelly, Sommers, and Hartigan. The Government contended that this currency exchange was the "financial headquarters" of defendant Johnson's gambling operations conducted through the co-defendants. Johnson denied having any connection whatsoever with the Lawrence Avenue Currency Exchange, or any interest in the Albany Park Bank Building in which it was located. Brown and Hartigan claimed to be joint owners of the currency exchange and denied that it was a part of any unified gambling operation of the co-defendants or of Johnson.

All of the Government's testimony purporting to show that the gambling operations of the co-defendants were part of a unified enterprise and that Johnson was the owner of the enterprise was admittedly circumstantial. No direct evidence of receipt of any income from these operations by defendant Johnson was offered by the Government. The Government's evidence showed that Johnson reported about $800,000 in taxable income and paid taxes of some $350,000 on it during the years covered by the indictment (3 MR. 763-764).

An important issue at the trial was whether Johnson was chargeable personally with large expenditures for certain properties. It was on the basis of testimony of Goldstein, then, and even now, under indictment for perjury to protect his client Skidmore, that Johnson was charged with expenditures as the *sole* owner of the Bon Air Country

Club and adjacent properties, the "Dells" property, and the property at 9730 Western Avenue rather than as half owner with Skidmore as Johnson testified. It was also upon the basis of Goldstein's testimony that $7500 and $10,000 deposited as escrows preliminary to purchase of properties and $59,000 for the purchase of the Albany Park Bank Building were charged as expenditures by him rather than as by Skidmore.

In the circuit court of appeals in seeking the affirmance of the court below on the merits the Government contended that the evidence justified Johnson's conviction upon two theories—(1) the "expenditure theory" (which did not involve the co-defendants) and (2) the "ownership theory" which did involve them: The "expenditure theory" was an attempt to create a variant of the so-called "net worth" method of proving receipt of income. The "net worth theory" briefly stated is that if a comparison between a man's proven net worth at the beginning of a tax period and his proven net worth at the end of the tax period shows an increase in net worth, that increase may be attributed (with certain qualifications) to receipt of taxable income in the amount of the difference. The Government's expenditure theory is based upon evidence allegedly showing that the total of Johnson's personal expenditures during the period January 1, 1932, through December 31, 1939, exceeded the combined total of his assets on January 1, 1932, and his reported income for the years 1932 through 1939, both inclusive. Through the device of arbitrarily distributing this excess in arbitrary amounts as attributable to unreported income for the years 1937, 1938 and 1939, and designating the tax returns for 1932 through 1936 as being true and accurate, the Government produced a tabulation (Gov't Br., App'x B) reflecting these assumptions and thereby seeming to show that Johnson's unreported income

based on excess expenditures must have been received in the years 1937, 1938 and 1939.[5]

The "ownership theory" refers to the contention that the gambling operations of the co-defendants were part of a single unified enterprise, that Johnson was the real owner of that enterprise and that it constituted a source of large income. The theory does not, as its name might imply, relate to ownership of real property. The controversy as to the ownership of real property (with the exception of the Albany Park Bank Building) involved only the issue of how much money Johnson had spent during the years in question. The amount of his expenditures, however, was material and important to the Government's case under both the "expenditure theory" and the "ownership theory".

The method by which the Government sought to show that Johnson had made "large" expenditures "in excess of his stated resources" in order to prove both its "ownership" and "expenditure" theories, was as follows: The Government first introduced through testimony of Internal Revenue Agent Wilson (R. 10) an alleged admission of defendant Johnson to the effect that on July 1, 1932, his total available cash resources amounted to $78,000. It then introduced his income tax returns for the years 1932 through 1939. It introduced evidence, including testimony of the witness Goldstein, to show expenditures purportedly made by Johnson during the period January 1, 1932, through December 31, 1939. The Government then, through its expert witness Clifford totaled separately the items of

[5] The circuit court of appeals did not in its opinion advert to the question of whether the essential element in a net worth case, namely, proof of net worth at the beginning and end of each of the tax periods involved in the respective counts, could be found in the evidence in the original trial record. And this Court in its opinion did not suggest that the "expenditure" evidence standing alone would support a conviction but characterized it as reinforcing evidence offered to show Johnson owned the gambling houses operated by the co-defendants.

expenditure and the items of income as shown by Johnson's returns plus the $78,000, and compared the two totals. This comparison allegedly showed that the expenditure total exceeded the total of reported income and cash assets by some $474,000 (3 MR. 742; Gov't Br. 22).

The Government conceded that Johnson's income-asset total should be increased by some $36,875 which reduced the deficit to some $437,000 (Brief on Reargument in this Court, p. 109). The Government has admitted that another item amounting to $37,000 should be deducted from Johnson's alleged expenditures (R. 21). This item involved a loan which Johnson admitted he had made to William R. Skidmore but testified had been repaid in the year in which it had been made.

In addition there is a $16,500 item which ought also to be eliminated from this total. This item involves payments for the purchase of an equity and certain second mortgage bonds (See R. 21).

On the basis of Goldstein's testimony Johnson was charged with being the sole owner of the Bon Air Country Club and adjacent properties, including the Curran Farm, "The Dells," and the 9730 Western Avenue property. Johnson admitted a one-half ownership in these properties. He would have been charged with personal expenditure of $393,815 on the basis of a one-half ownership instead of some $787,630 as sole owner had it not been for Goldstein's testimony (see Gov't Br. App'x B).[9] Johnson denied any interest in the $7,500 and $10,000 escrow deposits and in the Albany Park Bank Building. He would not have been

[9] The Government contends in its brief that Goldstein's testimony as to Bon Air only involved the purchase price (Br. 23) whereas the major portion of the expenditure involved was for improvements which amounted to some $600,000. It neglects the point that only on the basis of assuming full ownership in Johnson could the entire, rather than half, the cost of the improvements be charged to Johnson. The contention that Johnson was the sole owner can only be based on the Goldstein testimony. See Gov't Br. App'x B, citing only "7 R. 57-58".

charged with some $77,387 as owner of these items had it not been for Goldstein's testimony. The total of these amounts, $471,200, therefore would not have been charged against him had it not been for Goldstein's testimony, and at the close of the Government's evidence Johnson would have had a comfortable balance of some $90,000 to his credit rather than almost $500,000 in alleged personal expenditures which could not be explained by recourse to his reported income tax returns. Johnson's testimony showed an additional net expenditure of some $50,000.[10]

Concededly Goldstein's testimony was the cornerstone of the Government's so-called "expenditure" theory. That he was a most important witness in support of its "ownership" theory is demonstrated by the fact that in the portion

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[10] It is only by treating Johnson's testimony not as a net admission of $50,000 but as unrelated statements and relying on (1) his admission of additional uncharged expenditures of some $200,000 and ignoring (2) his claim of uncredited assets of approximately $150,000 that the Government and Judge Barnes (R. 513-514) are able to charge $200,000 rather than $40,000 additional to Johnson on the basis of his testimony. It is important to recognize that up until the time Johnson made the admission of net expenditures of more than $40,000, the Government had no evidentiary basis for its expenditure theory without the Goldstein testimony.

Johnson's admissions were purely voluntary. Although they did not result in establishing expenditures in excess of reported income in any year they did obviously tend to damage his case by reducing the amount by which his total reported income exceeded his admitted expenditures. That such admissions were against his interest must have been obvious to him as well. Therefore, the fact that he made them is a strong indication of his truthfulness.

The Government asserts that its evidence of excess expenditures by Johnson in the amount of $474,349.54 plus additional expenditures admitted by Johnson in the sum of $200,000 and less certain adjustments reflected a total of $640,387.86 as the excess of Johnson's expenditures over his available declared cash resources (Gov't Br. 22). $640,387.86

A. Because Johnson's admission of approximately $200,000 of additional expenditures was only part of a net admission against interest of about $50,000 or $60,000 (he claimed his assets at the beginning of the accounting period, January 1, 1932, were $140,000 or $150,000 in excess of the $78,000 admitted by the Government (3 MR. 960) there should be deducted at least $140,000.00
(Johnson's claim that at the commencement of the accounting period in 1932 he had between $140,000 and $150,000 (3 MR. 960) in addition to the $78,000 was confirmed by the testimony of Edward H. Wait showing that during the dog-racing season of 1931 he and Johnson received together $9,000 a week for five or six months (3 MR. 904) representing a return on Johnson's

of the Government's Brief on Reargument in this Court dealing with Johnson's "ownership" of the co-defendants' gambling houses, the Government opens and closes with Goldstein's testimony. (See footnote R. 48-49.)

Its contention that he had received more taxable income than he had reported reads:

> "The showing that Johnson had expended large amounts of money in excess of his stated resources fortified the conclusion that he was the owner of the gambling houses with which he had been identified. And the evidence of his participation in the affairs of the gambling houses made reasonable the conclusion that his large expenditures were made from in-

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initial investment of $100,000 and Wait's of $50,000 in 1927. See also admission of Clifford concerning amount of income reported for 1927 through 1931 inclusive (3 MR. 746)).

B. Johnson was charged with the full amount as purchase price of an equity ($16,000) and certain second mortgage notes ($45,000) (3 MR. 748), purchased from Tavalin who admitted Johnson got a discount but was hazy as to amount (2 MR. 13, 15, 25). Johnson, the only witness who testified as to the exact amount of the discount, stated he had paid only $7,500 for the equity and $22,000 for $30,000 of notes (3 MR. 957). His expenditures were therefore $16,500 less than the face amount charged to him by the Government. $16,500

C. On account of a loan which Johnson stated (2 MR. 411) he had advanced to Skidmore, he was charged with an expenditure in 1938 of $37,000 (3 MR. 764). Johnson testified the loan had been repaid in the same year in which it was made (3 MR. 984). The Government offered no evidence whatsoever to show the loan had not been repaid. Therefore this amount could not properly be charged to Johnson as an expenditure indicating unreported income. See also R. 21 where it is pointed out that the Government did not give Skidmore credit for the loan in computing his excess of expenditures over and above reported income and cash on hand. This could be justified only by a recognition that Skidmore had repaid the loan in 1938..... $37,000

D. The total by which the amounts of expenditures charged against Johnson on claim that he was sole owner of properties testified to by Goldstein should be reduced on the basis of uncontradicted motion evidence of actual ownership..... 471,200 $664,700.00

Minimum excess of resources and reported income over expenditures..... $24,312.14

come that was derived from his ownership of the gambling enterprises." (Gov't. Br. in Supreme Court, Nos. 799, 800, 1941 Term, p. 51.)

Materiality of Goldstein's testimony.—The Government relied for its proof of Johnson's alleged ownership of the Albany Park Bank Building (important in its "proof" of Johnson's ownership of the gambling houses operated by the co-defendants) upon its witness William Goldstein (2 MR. 57). It also relied heavily on the testimony of William Goldstein (2 MR. 55-68) for its proof of Johnson's alleged large expenditures "in excess of his stated resources."

The Government cannot now deny what is asserted vigorously in its brief on reargument (Br., Nos. 4 and 5, 1942 Term, p. 5) that the Goldstein and other expenditure testimony furnished "strong support" for the conclusion that Johnson was the owner of the gambling houses operated by the co-defendants and was offered for that purpose. And as the Government points out in its brief (Br. 12) this Court, on the basis of that contention, concluded that the expenditure testimony of which the Goldstein testimony was by far the most important had the effect of reinforcing this conclusion.

Facts Upon Which Original Motion for New Trial Was Based.

Defendants' motion for a new trial was supported by newly discovered evidence proving that Goldstein testified falsely on material matters. The motion was predicated primarily upon the claim that the submission of the case to the jury on a record containing Goldstein's false testimony was so prejudicial to all of the defendants that they were deprived of a fair trial and that they are therefore entitled to a new trial upon legal and proper evidence (R. 13).

Goldstein's false testimony related to ten items of property referred to in these proceedings as the "Bon Air" and its four related properties, the "Curran Farm," the "Green House," "White House," "Gas Station" (2 MR. 57-58), the "Dells" property (2 MR. 59), "9730 Western Avenue property" (2 MR. 56, 63-64), the "$10,000 escrow" (2 MR. 61), the "$7,500 escrow" (2 MR. 61), and the "Albany Park Bank Building" (2 MR. 56-57). *With respect to each of these items other than the two escrow items Goldstein testified that he had purchased the properties at Johnson's request with currency given him by Johnson and as to all save the two escrow items had caused quit claim deeds therefor to be given Johnson* (id., *supra*).

Johnson denied that he had arranged with Goldstein or given Goldstein any money for the purchase of any of these properties, and testified that he had acquired a half interest in the first seven of them from Skidmore, having agreed in advance of Skidmore's purchase of the "Dells" and 9730 Western Avenue properties to do so (3 MR. 955, 973), but not having known of Skidmore's proposed acquisition of any of the other five—Bon Air and related properties—until after Skidmore had purchased them (3 MR. 955). With respect to the remaining three items—two escrows and the Albany Park Bank Building—Johnson testified that he had never given Goldstein any money to purchase or to make a deposit toward the purchase of the properties in question, that he had no interest whatsoever in any of them and that he had never received a deed or any other evidence of ownership concerning them (3 MR. 955, 957, 977 *et seq.*).

Theory of Proof of Goldstein's False Testimony.

Goldstein's testimony that Johnson on various occasions, at various unspecified times, privately gave him various sums of money to purchase the properties involved can be directly disputed only by Johnson who, according to Goldstein, is the only other person able to testify of his own knowledge concerning the transactions. Johnson denied that any of the transactions took place. To support Johnson's denial defendants offered evidence showing that he had no motive or interest to make this particular denial, and other evidence to corroborate him and to demonstrate his general reliability under oath. Defendants also offered evidence to show that Goldstein had two powerful incentives to testify falsely; first, to protect himself, and secondly to protect his friend and client Skidmore. The first motive was demonstrated by showing that prior to taking the witness stand Goldstein obtained a dismissal of the indictment charging him with aiding and abetting Johnson in the evasion of income taxes; that at the time he took the stand he was under indictment for perjury and free on bail; that, shortly after he testified, he was permitted to draw down the bail money and remain at large on his own recognizance and that he is still, over five years later, at large, never having been brought to trial on the perjury indictment. Defendants proved further that Goldstein had an additional motive to file false affidavits reaffirming in part his trial testimony for use by the Government on the motion and amended motion for new trial. This additional motive is found in the fact that only through the offices of the United States Attorney has Goldstein been able to prevent a hearing on disbarment charges, the hearing having been twice postponed at the intervention of the United States Attorney (the disbarment charge filed by Johnson is based on the

claim that Goldstein testified falsely at the trial of this case).

With respect to Goldstein's motive to protect Skidmore, defendants proved that Goldstein for many years prior to the trial was Skidmore's close friend and attorney and that at the time of the trial he was counsel of record for Skidmore in a criminal income tax case and in a companion civil case. The record shows that Skidmore, at the same time as Goldstein, obtained a dismissal of the indictment charging him with aiding and abetting Johnson in evading taxes. Skidmore's own tax case was based on the contention that increases in his net worth during the years 1936, 1937 and 1938 proved he had received taxable income in excess of his reported income. The evidence proves that at the time the grand jury instituted an investigation of Skidmore's tax evasion Skidmore and Goldstein took steps to conceal the fact that Skidmore had acquired the various properties involved in Goldstein's testimony and that he owned 50 per cent of seven of them and 100 per cent of the three remaining items. The Government charged Goldstein with perjury to protect Skidmore in his tax case and formally indicted him on this perjury charge (this is the perjury indictment referred to above). Goldstein's testimony clearly had the effect of concealing Skidmore's interest in these properties to Skidmore's benefit in his criminal case and to his substantial benefit in the companion civil case. At Skidmore's later criminal trial he was convicted but the Government was not able to buttress its case by showing in addition to other property acquisitions Skidmore had acquired the properties here involved.

Defendants also proved that Goldstein admitted on numerous occasions that he had testified falsely at the trial in the instant case. These admissions were made under circumstances precluding any possibility of collusion for

the purpose of obtaining a new trial for Johnson. In addition defendants proved many statements and actions by Skidmore completely irreconcilable with his trial testimony. Defendants also proved that Goldstein is an unreliable witness under oath by showing numerous false statements in affidavits made by him and submitted on the amended motion for new trial.

The evidence of Skidmore's acquisition and ownership of the properties involved, directed to the issue of the falsity of Goldstein's testimony and proving a compelling motion on his part to testify falsely, also demonstrates that Johnson was improperly charged on his trial with huge expenditures not reconcilable with his reported income. It demonstrated that he did not make some of the expenditures charged to him at all and that other expenditures charged should be reduced by 50 per cent.

Defendants also proved the effective abandonment of the ownership theory of the Government by showing that after this case had been submitted finally to this Court on reargument, the Government charged the co-defendants with being the owners of the gambling houses operated by them and with having received as their own taxable income all of the alleged income of these houses. Any contention that Johnson received this income therefore can no longer be made. On this basis defendants' position is that in addition to proving that their trial was an unfair one and that therefore they are entitled to a new trial, the motion also demonstrated quite apart from the question of Goldstein's false testimony that on a new trial the jury would probably acquit rather than convict (The Court of Appeals, finding that the evidence proved Goldstein's falsity beyond any question, did not consider the question whether without regard to falsity a new trial would probably result in a verdict of acquittal).

Trial Court Opinion.

This proof was deemed insufficient by the trial court. It held the rule of *Berry* v. *State*, 10 Ga. 511, to be "the rule of law that governs the court in its consideration of the present motion" (R. 464-465). Applying that rule to the evidence it held (R. 514):

> "each and every such item [of allegedly newly discovered evidence now proposed by the defendants to be presented to a jury] is excluded from the classification "newly discovered evidence warranting a new trial" by at least one of the elements of the rule of law applying in such cases and above stated. All but a few items are merely cumulative of other like items presented at the trial. * * * The movants have not been diligent as to these items. All items which are not merely cumulative, are merely impeaching. * * * The movants have not been diligent as to these items."

Much of the proof on the motion for new trial was offered to show that in the first group, the Bon Air and adjacent properties, the Dells and 9730 Western Avenue properties, were owned 50 per cent. by Skidmore and that the second group, two escrows and Albany Park Bank Building, were owned 100 per cent by Skidmore. In addition extensive proof was tendered to show that Skidmore employed Goldstein to acquire these properties and that Johnson's 50 per cent interests in the first group were obtained through Skidmore. This evidence was offered because (a) it demonstrated a strong motive on Goldstein's part to testify falsely concerning the acquisition and ownership of properties (b) it demonstrated complete knowledge on the part of Goldstein, at the trial, of the fact, crucial at the original trial, that Skidmore's ownership in the properties was highly important and the fact that concealment of that ownership was of grave importance to Skidmore and Goldstein,

and (c) it tended strongly to corroborate Johnson whose testimony contradicting Goldstein was the only conceivable testimony of an "eye witness" character that could be adduced on the question of falsity of Goldstein's testimony. The trial court, conceiving this evidence to be offered only to the issue (characterized by him as "of lively interest" at the main trial) of the extent of Johnson's ownership of the properties in question, important at the trial because it bore upon the amount of personal expenditures he made during the years involved, treated all such testimony as though offered to show only that on a second trial with this as additional evidence an acquittal rather than a conviction would result. The trial court held that evidence of Skidmore's acquisition and half ownership in the Bon Air and adjacent properties, the Dells and 9730 Western Avenue and his ownership of the escrows and the Albany Park Bank Building had no bearing on the question of whether Goldstein testified falsely. This holding resulted from a misconception of the purpose for which defendants offered the testimony. The trial court conceived defendants contention to be (a) Goldstein testified that Johnson was the "sole owner" of all of these properties (b) the motion evidence proved Skidmore to be the half-owner of some, and the sole owner of the remainder, and (c) therefore, Goldstein was shown to have testified falsely. Answering this supposed contention the trial court held that Goldstein did not state that Johnson was the "sole owner" of these properties and therefore proof that he was not the sole owner did not prove that Goldstein lied. (Defendants did, and do, contend that the purpose, effect and meaning of Goldstein's testimony was to place sole ownership of all of these properties in Johnson and that in evaluating the materiality and importance of Goldstein's testimony this fact was of the utmost significance.) Defendants also contend that evi-

dence proving Johnson was not the sole owner and that Skidmore, Goldstein's client had an ownership interest which was concealed by Goldstein at the trial to save Skidmore from criminal and civil liability with full knowledge by Goldstein of the fact of Skidmore's ownership is sufficient to raise serious question concerning the falsity of Goldstein's testimony that he had purchased the properties for Johnson with currency given him by Johnson.

However, the defendants did not rely solely on this important evidence but went further and introduced evidence of admissions by Goldstein that his exact testimony was false, evidence strongly corroborating Johnson's categorical denial of the Goldstein testimony and evidence of actions by Goldstein irreconcilable with the truth of his testimony. None of this evidence was considered by the trial court in the light of the purpose for which it was offered because of his determination that the primary purpose of defendants' evidence was to show something less than sole ownership in Johnson rather than to prove the falsity of Goldstein's testimony.

The court held that "the *ownership* of these various properties was a subject of lively interest at the trial" (R. 466), that each side at the trial presented evidence as to *ownership* of the ten properties here involved (R. 466-467) and stated that on the motion for new trial the "*ownership* is now questioned" (R. 468). The court thus treated the motion not so much as raising the issue of falsity of the testimony of Goldstein but as a renewed contention that Johnson did not own the properties. The court refers (R. 474) to the trial testimony of defendants' expert witness Sullivan (3 MR. 991-996) tabulating Johnson's income and expenditure items in response to a hypothetical question that eliminated from the Government's computation

(made by its expert Clifford (3 MR. 741-745)) the items of property Johnson said he did not own. The court then states that by this testimony defendant "put before the jury the *very contention* that they are now seeking *to present again* in the present motion" (R. 474).[11]

Thus viewing the issue as being the same as on the trial, the court rejected "each and every such item" as "excluded from the classification 'newly discovered evidence warranting a new trial' by at least one of the elements of the rule" of the *Berry* case, as being "merely cumulative" or "merely impeaching"[12] and on the ground that the defendants had not been diligent as to any of the items except as to Green's impeaching affidavit (R. 514-515). Having thus excluded this evidence, the court reiterated that it did not believe Goldstein had "perjured himself" on the trial. It said that Johnson is the one person referred to in the evidence who habitually used currency in large amounts and habitually kept large amounts of money on hand (R. 515).[13]

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[11] The court ignores the fact that Sullivan did not contradict Goldstein. He was merely an expert accountant who tabulated various items in answer to hypothetical questions and did not himself testify on the propriety of including or excluding any of such items from the computation based on whether Johnson did or did not make any of the expenditures charged by Goldstein.

[12] There was no consideration by the court as to whether any of these affidavits were admissible for consideration as establishing false swearing under the rule of the *Larrison* case which recognizes that evidence directed to false swearing may be considered even though cumulative as to issues on the trial.

The court ignored the fact that all these affidavits were directed to the new issue whether Goldstein testified falsely. It held that because they dealt with facts as to the source of income for purchase of property and Goldstein's delivery to Johnson of deeds to property, the affidavits were to be treated as though directed to the same issue as that at the trial—the ownership of property and escrows. Hence they were cumulative. Of course, evidence to show falsity will in its nature necessarily impeach. *Under the trial court's rule, there could be no evidence justifying new trial on the ground of false swearing.*

[13] The court and the Government in making the same contention now (Br. 20, 93) ignored the affidavits of Garry (R. 107), Piazza (R. 167), Shaffron (R. 82), Herman (R. 115) and Jacobs (R. 162), showing that Skidmore customarily paid out large sums of money in cash. See also 123 F. 2d 604, 608, showing large daily receipts of cash by Skidmore.

Circuit Court of Appeals Opinion.

The circuit court of appeals did not reverse the trial court for failure to apply the *Larrison* case since, in view of the fact that the finding that the Goldstein testimony was not false was accepted by the appellate court, the result even under the *Larrison* case would have been a denial. *Larrison* v. *United States*, 24 F. 2d 82. The court stated that it could not say "in the light of the whole record before the district court that the so-called newly discovered evidence *inevitably* leads to the conclusion that Goldstein had testified falsely. We cannot say, as a matter of law, that the district court erred in its finding."

Facts on Which Amended Motion for New Trial Was Based.

The amended motion for new trial relied on all the evidence submitted in support of the original motion (R. 29) plus the amended and delinquent returns for income tax of Theodore Goldstein for 1937-1943, inclusive, filed and paid by William Goldstein, as his agent (R. 33, 47-74), and two additional affidavits of Sampson and Wait (R. 75, 76).

Trial Court Opinion on Amended Motion.

On the amended motion for new trial the trial court quoted and readopted its prior holding that the rule of law governing the court in its consideration of the motion was that of *Berry* v. *State*, 10 Ga. 511, applicable to ordinary motions for new trial on the ground of newly discovered evidence (AR. 136-137). The court quoted from its prior opinion to the effect that the issue presented on the motion was as to the ownership of the properties (AR. 140-141).

The trial court again failed to notice that the rule of the *Larrison* case controls consideration of motions for new

trial based on newly discovered evidence of false swearing. And it again failed to recognize the substantial probative effect on the issue of false swearing by Goldstein resulting from the evidence of ownership of Skidmore which in turn established motive of Goldstein and corroboration of Johnson who directly contradicted Goldstein. It recognized that the income tax returns might reasonably be held to be evidence that, during the years in question, Ted Goldstein had some interest in the property, other than as the holder of the pure legal title (AR. 152). However, it held the income tax returns must be excluded, under the rule in the *Berry* case because (1) not so material that they would probably produce a different verdict if a new trial were granted and (2) cumulative only.

It held "each and every" item of the evidence excluded from the classification "newly discovered evidence warranting a new trial" by reference to the *Berry* case (AR. 167-168). It then stated that the court does not believe that Goldstein recanted or prejured himself (AR. 168). An order denying motion for a new trial was entered accordingly (AR. 171).

Circuit Court of Appeals Opinion on Amended Motion.

On appeal from the denial of the amended motion for new trial the court below held that the trial court erred in considering the evidence solely with respect to whether on a new trial it would probably result in an acquittal and failing to consider it as bearing upon the question whether the original trial was a fair trial (AR. 228). The appellate court examined the evidence from the standpoint of whether Goldstein had testified falsely at the original trial to the prejudice of the defendants and found that the evidence "unerringly points to the fact that Goldstein's trial testimony was false" (AR. 227). It stated that its "con-

viction in this respect is without reservation" (AR. 226). As to the Goldstein affidavits on which the Government relied, the court held (AR. 225): "The proof therein contained affords no substantial support for a finding that he testified truthfully at the trial." On the question of whether Goldstein's testimony was material or important the court said (AR. 209): "That Goldstein's testimony was material and, if false, was highly prejudicial to the defendants, is not in dispute." On the question of diligence the court held (AR. 230): "we are of the view that there has been no delay so unreasonable as to preclude consideration of the proof which defendants have presented." Thus finding that all of the elements of the *Larrison* case were satisfied, the court concluded that the trial court's failure to order a new trial constituted an abuse of discretion.[14]

The court entered its order directing new trial accordingly (AR. 237).

SUMMARY OF ARGUMENT.

1. Certiorari was granted in this case to review the question whether the court below "applied improper standards in reviewing and reversing the action of the district court". The Government now states the question to be "whether the trial court abused its discretion * * *", a manifestly different question in the light of the rule that determination by an intermediate court on review of a trial court decision involving exercise of judicial discretion will not be set aside except for strong reasons. *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141. Under numerous decisions of this Court questions not raised in the petition are

[14] The court adverted to its prior opinion affirming the denial of defendants' original motion for new trial and observed that it had in that case accorded the rule "a more strict application than the circumstances justified", and furthermore the evidence on the amended motion furnished "strong additional support for the contention that Goldstein's testimony was false" (AR. 227).

not open for argument on writ of certiorari. Because the Government brief contains no specification of errors, no error of the court below is presented for review here. Furthermore, except for the first, the points in the Government brief are addressed to the action of the trial court and not to the judgment of the appellate court brought here for review. The decision below should therefore be affirmed.

2. The evidence in support of defendants' motion required a new trial under the rule of *Larrison* v. *United States*, 24 F. 2d 82, establishing the criteria for consideration of motions for new trial based on newly discovered evidence of false testimony, and as well required new trial under the rule generally applicable to motions for new trial for newly discovered evidence directed to the issue of guilt or innocence at the trial. The three propositions required by the rule of the *Larrison* case (1) false testimony by a material witness, (2) that without the false testimony the jury *might* have reached a different result and (3) that the party seeking the new trial was taken by surprise and was unable to meet the false testimony at the trial or did not learn of its falsity until after the trial were established. Evidence of Goldstein's false swearing includes showing that he was motivated by a desire to protect his client Skidmore in furtherance of a conspiracy with him to conceal Skidmore's acquisition and ownership of properties and so avoid civil and criminal liability of the latter for income tax evasion. For perjury before the grand jury in furtherance of that conspiracy he had been indicted, and was under the recognized threat of prosecution on that indictment. Numerous overt acts by both Skidmore and Goldstein in furtherance of that conspiracy are shown. Shortly after he testified for the Government in this case, his bail was lifted with the consent of the Government and he has been free for five years upon his own recognizance. Gold-

stein also has a strong motive to continue to support his trial testimony in order to retain the aid of the United States attorney in avoiding disbarment on complaints filed with the State Bar Association. Goldstein also found reward in this very case in that the indictment in the instant case, which also included him, was dismissed as to him and his client on the morning of the first day of the trial. The evidence shows that Goldstein, after the trial made statements inconsistent with his trial testimony respecting the source of the purchase money for Bon Air, the largest single property whose ownership was charged to Johnson as a result of his testimony. Affidavits of an attorney and of an estate officer having no possible interest in the case show that after the trial Goldstein claimed as his own escrow deposits he had testified were made with money furnished him by Johnson. His actions and statements after trial were also inconsistent with his testimony that money for the making of other investments had been furnished him by Johnson. As to the Albany Park Bank Building, his trial testimony that the purchase price had been given him by Johnson, that Johnson had requested Goldstein to purchase the property for him and that his son Ted Goldstein had delivered a quitclaim deed to Johnson are shown to be false by Goldstein's actions after the trial and by income tax returns filed by Goldstein on behalf of his son Ted. Goldstein's affidavits on the original motion for new trial with respect to this property are also shown to be false or inconsistent with other affidavits made by him. Goldstein also made two general admissions that his testimony against Johnson had been false at the trial. Despite the fact that the original motion for new trial was first filed in October, 1943, the Government has been unable to adduce a single witness to corroborate Goldstein's trial testimony here in question. The record itself affords no

corroboration for Goldstein and all of the circumstances shown by the evidence indicate that Johnson told the truth in denying that he gave Goldstein the purchase moneys.

The question of guilt on the original trial was narrowly balanced and the circuit court of appeals held that the materiality and prejudicial nature of Goldstein's testimony was not in dispute. Contrary to the Government's position now, a reversal of its position when the case was before this court at the 1942 Term, the expenditure evidence furnished important support for, and was relied on to fortify, the ownership theory. Goldstein's challenged testimony was used for this purpose, and in addition his testimony as to Albany Park Bank Building was, without regard to expenditure involved, important to the ownership theory. Under the charge to the jury instructing that if part of a witness's testimony was disbelieved, it might be disregarded in toto, the testimony of Goldstein was plainly prejudicial since it was in extended and direct conflict with the testimony of Johnson which, if believed, would require acquittal. The Government does not seriously argue the question of diligence. The Government's argument that the appellate court applied the wrong rule of law in invoking the *Larrison* case is posited on the proposition that the evidence of falsity was not sufficiently clear and convincing. It amounts to no more than another form of argument that the evidence of false swearing was insufficient.

Even under the rule of *Berry* v. *State*, 10 Ga. 511 urged as the applicable rule by the Government, the respondents were entitled to a new trial because the evidence submitted on the motion was so material that it would probably produce a different verdict if a new trial were granted. The evidence demonstrates that Johnson in fact never made any expenditures not reconcilable with his reported income and the Government, by bills of particulars filed under pending indictments against Johnson's co-defend-

ants has abandoned the charge that Johnson was the owner of the gambling houses upon which it relied in support of the so-called ownership theory. Johnson's testimony at the trial as to his personal expenditures is proved to be true by the motion evidence which thus furnishes important corroboration and support for all of his testimony, which if believed would required acquittal.

3. The trial court's denial of the amended motion for a new trial constituted an abuse of discretion, traceable largely to its basic misconception that the evidence of ownership of investment properties by Skidmore was aimed directly at showing Goldstein's exact words were false. The court erroneously held that respondents pitched their case on the wrong assumption that Goldstein had testified in so many words that Johnson was the owner of the properties on which the Government relied as showing excessive expenditures. It also erroneously held the proof of Goldstein's false swearing should be by formal recantation or by affidavits of persons having personal knowledge of a transaction of which, by Goldstein's testimony only he and Johnson could know. Because the motion evidence tended also to show the innocence of Johnson and the co-defendant of the charge on which they were tried, the trial court erroneously held that it could not support an order for new trial because cumulative. The court thus erred in overlooking that evidence pertinent on the issue of false swearing could not be rejected on the ground that it might be cumulative on the different trial issue—Was Johnson the sole owner of the properties?

The trial court, in considering the sufficiency of the evidence to require order for new trial under the doctrine of *Berry* v. *State*, supra, committed obvious error in holding that evidence, because it was cumulative or impeaching must be rejected. The court confused the rule that evi-

dence which is "merely cumulative" or "merely impeaching" and hence not such as would probably produce an acquittal on a new trial is insufficient, and overlooked the fact that evidence that is cumulative, as it necessarily must be in most cases, or impeaching, may well be so convincing as to leave no doubt that an acquittal would result and hence require a new trial. The trial court also overlooked and gave no effect to the fact that all of the evidence on the motion for new trial and on the amended motion had been initially considered by the circuit court of appeals and that the granting of the order of remand constituted a holding by that court that the evidence was not insufficient to justify a new trial.

4. Mere perusal of the opinion of the circuit court of appeals shows that it did not apply improper standards in reviewing and reversing the action of the district court and that its conclusion that the trial court had abused its discretion was based on numerous errors of law and arbitrary actions of the trial court in the consideration of the evidence. The scope of its review was in this case not limited by the added respect afforded to findings of a trial judge who has had opportunity to observe the demeanor of witnesses because all of the evidence was documentary or in the form of affidavits.

The record affirmatively shows that the circuit court of appeals was required on the evidence to conclude that the evidence pointed irresistibly to false swearing by Goldstein at the trial and that Goldstein's affidavits were not worthy of belief. In so determining, and in holding that the contrary conclusion of the trial court constituted an abuse of discretion the circuit court of appeals committed no error and the United States has failed to establish any.

ARGUMENT.

I.

THE ONLY QUESTION PRESENTED AND PROPERLY BEFORE THIS COURT IS WHETHER THE CIRCUIT COURT OF APPEALS APPLIED IMPROPER STANDARDS IN REVIEWING AND REVERSING THE ACTION OF THE DISTRICT COURT.

Examination of the Index and Points of Argument of the Government's brief indicates that the case here on certiorari is regarded by the Government primarily as a vehicle for review of the correctness of the trial court's decision. The Government's brief contains no specification of errors whatsoever and only a relatively small portion of the argument (the first Point) even purports to be addressed to the action of the court whose judgment is here for review.

Questions not raised on the petition will not be considered.—The petition for certiorari on which the writ was granted states as the "Question Presented" (Pet. 3):

> "Whether the court below applied improper standards in reviewing and reversing the action of the district court denying respondents' second, amended motion for a new trial based on allegedly newly discovered evidence that a Government witness testified falsely at respondents' trial."

The Government has shifted its position. It now appears that all that is sought is a reconsideration and review by this Court of all the evidence before the trial court. For the Government now states (Br. 2) as the "Question Presented":

> "Whether the trial court abused its discretion in denying respondents' amended motion for a new trial purportedly based on allegedly newly discovered evi-

dence that a Government witness testified falsely at respondents' trial."

The Government thus fully confirms the statement in our Brief in Opposition to the Petition, p. 14:

> "the Government is here merely seeking another review of the facts, in a record now constituting many thousand pages."

The petition for certiorari contained no specification of errors intended to be urged. We assume that this Court does not intend in this case to depart from the well-established and recently re-enunciated rule that questions not urged in the petition are not open for argument on certiorari. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240; *Steele* v. *Drummond*, 275 U. S. 199, 203; *Helvering* v. *Taylor*, 293 U. S. 507, 511; *Prudence Co.* v. *Fidelity & Deposit Co. of Md.*, 297 U. S. 198, 208; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494; *Connecticut Ry. Co.* v. *Palmer*, 305 U. S. 493, 497; *Rorick* v. *Devon Syndicate*, 307 U. S. 299; *Dickinson* v. *Cowan*, 309 U. S. 382, 389.

The Government brief on the merits specifies no error for consideration by this Court.—Rule 27, par. 2, prescribes that the brief shall contain "(e) A specification of such of the assigned errors as are intended to be urged." The Government brief contains none. The same Rule 27, par. 6, provides "errors not specified according to this rule will be disregarded, save as the court at its option, may notice a plain error not assigned or specified."

The record contains no plain error. The judgment of the court should therefore be affirmed.

From the index stating the points of the Government's argument, it appears that the only part of the argument addressed to the action of the circuit court of appeals (it is the judgment of that court that is here for review), and the only part of the argument that falls within the

scope of the question urged in the petition for certiorari is the first point (Gov't Br. 67):

> "The majority opinion below improperly rejects the trial court's conclusions and substitutes the majority's own conclusions as to the weight of the motion evidence instead of determining whether the trial court's factual conclusions are unreasonable, arbitrary or capricious."

The remaining stated points of argument in the Government's brief are addressed to the action of the trial court as though the case were here on appeal from the district court, and the United States were respondent. We show below that there is no merit in any point urged by the government.

II.

THE EVIDENCE IN SUPPORT OF DEFENDANTS' MOTION REQUIRED THE ALLOWANCE OF A NEW TRIAL.

It is the defendants' contention that whether the evidence be viewed as addressed to the issue of false swearing by Goldstein at the trial already had or as addressed to the issue whether the newly discovered evidence if adduced at a new trial would probably result in acquittal, it is in either event sufficient to require granting of the motion.

A. THE MOTION EVIDENCE CLEARLY DEMONSTRATED THE RIGHT OF DEFENDANTS TO A NEW TRIAL BECAUSE OF FALSE TESTIMONY AT THE TRIAL HAD.

The motion evidence clearly demonstrates that the testimony of Goldstein, a material witness at the trial, was false, that without such testimony the jury might have reached a different result and that there has been no lack of diligence on the part of defendants.

Goldstein's testimony as to each of the seven properties: Bon Air and its four adjacent properties, 9730 Western

Avenue, and The Dells, was that he received the purchase money from Johnson, acted in purchasing the property at the request of Johnson and delivered a quit claim deed to the property to Johnson (2 MR. 56, 57-59). The respondents' evidence shows that Goldstein did not obtain the money from Johnson. Their evidence also shows that as to 9730 Western Avenue and the "Dells", Johnson was given a quit claim deed for only a one-half interest. The evidence also shows that quit claim deeds for 100% interest in the Bon Air and adjacent properties were only given by Goldstein to Johnson so that he could record them in order to conceal Skidmore's half interest in the properties.

Goldstein's testimony as to the two escrows of $10,000 and $7,500 was that Johnson furnished the money (2 MR. 61). Respondents' evidence shows that Johnson did not give Goldstein the money, that Goldstein repudiated this testimony and that the money was probably Skidmore's.

As to the Albany Park Bank Building, Goldstein testified (2 MR. 57): "I was requested by Mr. Johnson to go out there and purchase the building for him. * * * I received the money from Mr. Johnson, in the form of currency. * * * Subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son." Respondents' evidence shows that Johnson did not give Goldstein the money to purchase this property, it was not purchased for Johnson, and that no quit claim deed was delivered to Johnson.

1. **Goldstein Testified Falsely at the Trial.**—Goldstein's testimony concerning the payment of money to him by Johnson for the purchase of the various properties in question made the occasions of such payments private meetings at unspecified times and places (2 MR. 118-124, 126-127). That they took place at all was categorically denied

by Johnson. Under Goldstein's version only himself and Johnson could possibly have been eye witnesses to the meetings. Under Johnson's version there could have been no eye witnesses since the meetings never took place. Proof that Goldstein testified falsely concerning these meetings and the payment of the money therefore could only be made by showing:

(a) That he had strong motive for testifying falsely.

(b) That he admitted the falsity of his testimony either by formal affidavit of recantation or in statements to other persons.

(c) His lack of reliability as a credible witness.

(d) Statements and actions of Goldstein inconsistent with the possibility of the truth of his testimony.

(e) Corroboration of Johnson's contradicting testimony.

(f) Absence of motive on Johnson's part to testify falsely on this point.

(g) Johnson's reliability as a witness.

All of the evidence offered by defendants falls within one or more of these categories and taken together conclusively demonstrates that Goldstein testified falsely.

Goldstein had impelling motives to testify falsely.— Goldstein is a Chicago lawyer who, prior to the time of this trial had been attorney for William R. Skidmore for twenty years (2 MR. 65). Skidmore was a "seller" of protection to those who engaged in the "handbook" business in Chicago and who received payments therefor in large sums of cash (*United States* v. *Skidmore*, 123 F. 2d 604, 608, cert. den. 315 U. S. 800, No. 813, O. T. 1941). At the time of Goldstein's testimony in this case Skidmore was under two indictments for attempts to defeat and evade a portion of

his income taxes. Income for the years 1933 to 1937, inclusive, were covered by the first, returned September 1, 1939, and his income for the year 1938 was covered by the second indictment, returned February 29, 1940 (123 F. 2d 604, 606). The Government's case against Skidmore was based on the "net worth" theory, i. e., that Skidmore "bought large amounts of valuable real estate and made extensive improvements upon them," "that his expenditures for those years were greatly in excess of his reported cash receipts, including borrowed money." Calculations of revenue agents at Skidmore's trial "for the years 1936, 1937 and 1938 [being three of the four years involved in the instant case] showed an excess of expenditures over his reported income in the respective amounts of $33,095.49, $117,580.44 & $94,097.67" (123 F. 2d 604, 608). It is admitted that at the time of his testimony in the case against Johnson, Goldstein was attorney of record for Skidmore in the then pending criminal tax evasion cases against him and in the companion civil tax case. The criminal case against Skidmore was not tried until some four months after the Johnson trial (123 F. 2d 604, 607).

It was thus of crucial importance for Skidmore to conceal any expenditures he made during the years 1936, 1937, and 1938 which would tend to show that he had any unreported taxable income in those years. The evidence shows beyond any dispute—indeed, it is not contradicted—that Skidmore during these three years acquired an ownership interest in the properties involved, that he himself participated in Goldstein's negotiations with some of the owners of them prior to Goldstein's purchase of such properties, that he sent selling agents for the owners of some of the properties to Goldstein to negotiate for the purchase, that he had an architect appraise several of them prior to Goldstein's purchase, and that he himself inspected

some of the properties prior to their purchase by Goldstein.[15]

That Goldstein and Skidmore conspired to conceal Skidmore's acquisition of these properties and his ownership in them is amply established.

Numerous overt acts by both Skidmore and Goldstein in furtherance of this conspiracy are shown. For example, the recording of title to the Bon Air and adjacent properties in Johnson's name by Goldstein to conceal (R. 163) and his use of the device of quit claim deeds from Johnson to Skidmore for a half interest in the properties to protect, Skidmore's ownership (R. 163, 188); the destruction by Jacobs at Skidmore's instance (R. 163) of insurance company records which showed that Skidmore had ordered and paid for premiums on policies covering the Bon Air (R. 162); the assignment (without Johnson's knowledge) to Johnson of numerous small policies covering some of the Bon Air properties at the time title to such properties was recorded in his name; the admonition by Skidmore in Goldstein's presence to Shaffron to deny Skidmore's admitted ownership in the Bon Air because the Government was trying "to pin" it on him (R. 83); the directions to Henrichsen and Alice Kemp to conceal and deny Skidmore's ownership in the properties (R. 84); Goldstein's false testimony at the trial of these cases designed to conceal Skidmore's interest in the properties by making it appear that Johnson was the sole owner of them;[16] Skidmore's denial of his ownership in his own criminal trial; Goldstein's representations to Holleran and Guild and to the State

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[15] We have detailed in the Appendix to this Brief the voluminous evidence on this point adduced on the original motion for new trial and made a part of the evidence on the amended motion.

[16] Goldstein's forced admission on cross examination that Johnson had only a half interest and that Skidmore had the other half interest in 9730 Western Avenue, wrung from him by production of a deed he himself had drawn and delivered to Johnson (2 MR. 56, 63-65) and his attempt to explain his direct testimony designed to place sole ownership in Johnson by the statement that he had forgotten and that "Had I remembered, I would have said so" (2 MR. 67) reveal alike Skidmore's ownership and Goldstein's purpose to conceal it.

Bank of Evanston that he was the owner of the escrows (R. 128, 132-134) and his representations to Blockus that he was the owner of the Albany Park Bank Building (R. 198); Goldstein's patently false affidavits that he was holding the $7500 escrow for the Bureau of Internal Revenue and the rents of the Albany Park Bank Building for the same purpose because of a lien for Johnson's taxes (R. 252, 261); Goldstein's attempts to use such rents to settle real estate tax claims against the Albany Park Bank Building (R. 198-199); Skidmore's decision at Goldstein's instance not to defend a partition suit which would have required disclosure of his interest in Bon Air property (R. 101); Goldstein's offer to use some of the $10,000 escrow to settle a lawsuit in which he and Skidmore were defendants if the escrow was released (R. 133-134); Skidmore's direction to Henrichsen to return mail addressed to him at the Bon Air with a notation that he was not known at that address (R. 84) and his direction to Henrichsen to keep Goldstein advised as to any litigation affecting title to the property, etc. (R. 90). It cannot be questioned therefore that Goldstein and Skidmore desired strongly to conceal Skidmore's ownership in these properties and that Goldstein was not only willing to testify falsely under oath to further that purpose, but as the Government admits, had done so on at least one other occasion.

In addition, Goldstein told Green that he had to testify falsely at the trial of these cases to help himself because of "charges of contempt, conspiracy, and perjury pending against him and to help Skidmore" (R. 100). Goldstein also told Green "I might as well be dead as disbarred" (R. 216). So completely corroborated are these admissions of Goldstein to Green that Goldstein sought escape by denying that he had made admissions in his admitted conversations with Green prior to the filing of Green's affidavit (R. 243) but felt called upon to deny that he had ever had the conversation sworn to by Green in which he upbraided Green

for telling the truth in such affidavits (R. 264). Proof by the completely disinterested witness Engelbretson that Goldstein did seek Green out at the time and place sworn to by Green proves Goldstein's denials false, and completely corroborates Green (R. 232).

But Goldstein was subject to another compelling motive: To obtain immunity from prosecution on the indictment for perjury returned against him for testifying falsely before the grand jury in an attempt to protect Skidmore from indictment for income tax evasion. The pendency of an indictment over a witness for the prosecution of course is relevant to show the witness' interest in testifying favorably for the prosecution, and indicates the "possibility of his currying favor by testifying for the state." 3 Wigmore on Evidence, 3d ed., secs. 949, 967. The Government has never denied the statement in our brief in the circuit court of appeals on appeal from the order denying the first motion for new trial:

> "Goldstein was arraigned on this indictment and released on bail shortly thereafter, in February 1940. At the time he gave testimony for the Government in these cases he was at large on that bail. Shortly after he testified his bail was lifted with the consent of the Government and he was released upon his own recognizance. He has not yet been brought to trial on this indictment."

This has never been denied or explained.

Goldstein also has a strong motive to continue to support his trial testimony by false affidavits on the motion for new trial in order to avert prosecution on the perjury indictment and as well to retain the aid of the United States Attorney to avoid disbarment by the State Bar Association. A complaint against Goldstein charging perjury was filed with the Illinois Bar Association in 1942

(R. 240) but investigation was twice deferred at the request of Mr. Woll (R. 64; AR. 210). That complaint is still pending. Although Goldstein denied so stating (R. 243), there is thus ample factual support for Green's affidavit that Goldstein after the trial explained that he had to thus falsely testify "to help himself because of charges of contempt, conspiracy and perjury pending against him and to help Skidmore," and that he did so because "Mr. Skidmore always paid him; that Mr. William R. Johnson never paid him anything" and he could not retract because then "he would certainly be disbarred" (R. 100).

Of course, Goldstein by testifying against Johnson also found reward in thus securing the dismissal of the instant indictments against Skidmore and himself on the very morning of the trial (1 MR. 143). The Government attempts to minimize the importance to Skidmore of concealing his ownership in these properties by pointing out that Skidmore was convicted anyway (Gov't Br. 92). This is in contrast to the Government's attempt in Skidmore's criminal case to force an admission from him that he had an ownership interest in the Bon Air (R. 316). It also disregards the fact that Goldstein could appreciably reduce Skidmore's civil tax liability through concealment of his property interests.

It cannot be questioned that Goldstein and Skidmore desired strongly to conceal Skidmore's expenditures. Goldstein was not only under strong pressures to testify falsely to that end, but the Government admits he has already done so and has indicted him for it.

Goldstein made statements inconsistent with his trial testimony respecting source of purchase money for Bon Air.—The affidavit of Fowler shows that Goldstein swore falsely. Goldstein testified that in the purchase of Bon Air

Country Club he acted at the request of Johnson. The Evanston Bank was the receiver of the property. The price was $75,000 (2 MR. 57). Goldstein further testified (2 MR. 57):

> "I think the initial deposit of $7500.00 was deposited with Mr. Becker at the Evanston Bank and Mr. Blumstein, the attorney. I received the money from Mr. Johnson in the form of currency. * * * The balance of $67,500 was paid over to Mr. Becker and Mr. Blumstein at their law offices, in the form of currency that I received from Mr. Johnson."[17]

The affidavit of Fowler shows contrary statements by Goldstein. Fowler, a resident of Waukegan, from the date of its first publication, September 5, 1939, until January, 1941, when he resigned and retired, was the Treasurer and Executive Director of The Waukegan Post, Inc. (R. 213) of which William Goldstein was president and publisher (2 MR. 62-63). The Fowler affidavit states (R. 213) that on a number of occasions:

> "Mr. William Goldstein told me that he had bought the property known as the Bon Air Country Club for his client, Mr. William Skidmore, whom I had known for many years. That Mr. Skidmore had given him (Goldstein) the money to buy the said Bon Air Country Club property."

This statement squarely contradicts Goldstein's trial testimony that the purchase price for Bon Air was "in the form of currency * * * received from Mr. Johnson" (2 MR. 57). The Government here retreats from its assertion that defendants misapprehend Goldstein's testimony (Br. 67-69).

The Government admits (Br. 41-42): "If true, this alleged statement by Goldstein is directly in conflict with his testimony that Johnson gave him the money to purchase

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[17] The testimony of Goldstein is set out verbatim in view of the Government's assertion that respondents misconceive Goldstein's testimony and have not argued the falsity of his actual testimony (Br. 65, 84, 107).

Bon Air." This admission justifies careful scrutiny of the alleged basis for disregarding the Fowler affidavit.

Goldstein denies he made the statement and states that Fowler has been unfriendly since he discharged him (R. 264). In support, an affidavit of attorney Lidschin reveals that he brought suit for the newspaper company to restrain Fowler from cashing an unauthorized check (R. 267). The trial court apparently recognized that this was inadequate ground for ignoring the Fowler affidavit and held him discredited because of affidavits directed to another statement in the Fowler affidavit (R. 479, 497). The Government also relies on the same ground (Br. 42, 97).

Careful examination of the evidence shows that it all confirms Fowler and emphasizes the desperate lengths to which Goldstein and the Government were forced in view of the devastating effect of the Fowler affidavit which the Government explicitly recognizes. Fowler in the same affidavit also stated (R. 214) that after September, 1940 on an occasion when he asked Goldstein to collect from Johnson an account owed by Bon Air Country Club, Goldstein replied, "I won't see Johnson, he don't own the place. I'll tell the Boss (Skidmore) about it." He gave Goldstein the duplicate bills and statement. The bill was paid within a few days (R. 214).

Goldstein, in denying this, asserts (R. 264) that he instructed Fowler to turn the account over to an attorney, Joe Miller, who later started suit and collected the account. In purported confirmation of Goldstein's denial the Government relied on the affidavit of Lidschin (R. 266)[18] that on or about October 4, 1941, Miller handed him a letter of that date dictated by an Ernest L. Pratt and asking that suit be brought on behalf of the Waukegan Post, Inc., that

[18] Reference to the original record will show that in the Lidschin affidavit (R. 266) there is a printing omission. After the word "Illinois" in the second line, there should be inserted, "On or about October 4, 1941, Mr. J. A. Miller, an attorney at law in Waukegan, Illinois."

upon trial, defense was non-delivery of merchandise, judgment for $57.60 was entered, the Waukegan Post promised to deliver and the judgment was paid. Judge Barnes held this affidavit showed Fowler untrue (R. 479, 480).

The trial court overlooked the fact that Fowler had left the Waukegan Post in January, 1941 and therefore could not have directed the suit requested by letter of October 4, 1941 (R. 265, 213). Nevertheless, the court held that Lidschin's affidavit established the untruth of Fowler's affidavit (R. 479).

Although it seemed plain that Lidschin's affidavit referred to an entirely different bill, on the amended motion for new trial defendants submitted the affidavit of Wait (R. 75) which removes all doubt. Wait was manager of Bon Air (3 MR. 896, 897). His affidavit conclusively shows that Lidschin was referring to suit on a bill based on an order first placed on April 16, 1941, four months after Fowler ceased employment with the Waukegan Post. Attached to the affidavit is a copy of the invoice for $57.60 dated July 8, 1941, showing that the order was given "4-16."[19]

The Wait affidavit does not contradict Lidschin, but shows that the Lidschin affidavit refers to a bill other than that to which Fowler referred. The Wait affidavit does destroy Goldstein's denial and explanation. The trial court, faced with this new affidavit, on the amended motion, referred to the fact that Wait was a gambler,[20] and said (AR. 167), "The Court does not think it has that effect."

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[19] It is pertinent to note that respondents obtained certificates from the clerks of both the county court and the circuit court of Lake County that from January 1, 1936 to September 17, 1943 no suit or action was instituted in those courts by the Waukegan Post or Joseph A. Miller against the Bon Air Country Club or the Bon Air Catering Company, Incorporated (R. 242).

[20] Wait, a defendant in this case, was acquitted (1 MR. 153) and had no reason to incur a perjury penalty.

The Government now in the face of Wait's clear affidavit contra, weakly urges (Br. 42, note), "it would appear * * * that the date '4-16' referred to the year 1940." The Government suggests suit was too early for an April 1941 order, overlooking that here the merchandise had not been delivered because of dispute as to price (R. 267, AR. 75) and overlooking also that Fowler refers to a bill for *advertising* and printing (R. 214), whereas the bill to which Goldstein, Lidschin and Wait refer was for letterheads and envelopes (AR. 75, R. 267).

The circuit court of appeals held (AR. 223): "There is nothing in the record, however, which impugns Fowler's reputation in any manner. He is not shown to have any connection with any of the parties or any motive for making a false affidavit."

The Government (Br. ~~37, 77~~), to support Goldstein argues that the affidavit of Sperling (R. 104) states that in June 1939 Skidmore gave Garry, the Bon Air Cashier, $50,000 "to be applied against his share of *the cost of the property* and the cost and maintenance of the Club," and that on several other occasions Skidmore delivered amounts of $10,000 and $20,000 to Garry to apply on his account of cost and maintenance. The Government assumes that "cost of the property" means purchase price and argues that if Skidmore was paying the purchase price in 1939, he could not have given Goldstein the money in 1937, when the purchase was made. The Government assumes without warrant that the affiant used "cost" as synonymous with purchase price. "Cost" is used twice in the same sentence. In the second use, it obviously does not refer to purchase price and there is no more basis for assuming it means original purchase price in one instance than in the other. Aside from the fact that the affidavit of Garry, upon which the Government

relies (Gov't Br. 44, note) *shows* that the $50,000 was for the payment of bills, it is highly improbable that Skidmore would make payment to Johnson by handing the money to a cashier and paymaster at the club.

As to the $10,000 escrow, the affidavits of Holleran and Guild show statements of Goldstein inconsistent with his trial testimony.—At the trial Goldstein testified (2 MR. 61):

> "$10,000 was involved, covering some lots and acreage. The money was deposited with the Chicago Title & Trust Co., in the form of currency. I received it from Mr. Johnson, at whose request the deposit was made, on July 17, 1939."

Johnson testified that he did not furnish Mr. Goldstein the $10,000 for deposit and that he knew nothing about the contract of purchase nor to what land it referred (3 MR 957).

On the motion for new trial defendants introduced the affidavit of J. Lawrence Holleran, a practicing attorney, representing the beneficiary of the trust estate owning the property proposed to be sold and for which the $10,000 was deposited (R. 128); the affidavit of John W. Guild, the manager of the same real estate trust (R. 138); the affidavit of Fowler (R. 124),[21] and the affidavit of Henrichsen (R. 95).

The affidavit of Holleran (R. 130) shows that on November 1, 1940 (very shortly after the trial of this case—

[21] Fowler's affidavit states that in the fall of 1940 he discussed with Goldstein the need of money for the Waukegan Post, Inc. Goldstein told him that he had $10,000 in escrow in the Chicago Title & Trust Co. which would be available. (Skidmore was the owner of the Washington Post) (R. 214).

Walter Buck Henrichsen swore that Skidmore told him that he (Skidmore) "had $10,000 in an escrow in the Chicago Title and Trust Company as earnest money on the purchase of property known as Columbia Gardens adjacent to the Bon Air; that Mr. Johnson had no interest in the said $10,000.00 and that he (Mr. Skidmore) had attempted through William Goldstein to have the said $10,000.00 withdrawn from the said escrow" (R. 95).

August 27 to October 12, 1940 (1 MR. 152, 2 MR. 1)) Goldstein wrote to Holleran disclosing Goldstein's demand on the Chicago Title and Trust Co. for the return of the $10,000 escrow deposit to Goldstein; that shortly thereafter a meeting was arranged in Holleran's office between the latter, William Goldstein, Isadore Goldstein, an associate of William Goldstein,[22] and Mr. Guild (R. 131-132); that at that time Goldstein stated to Mr. Holleran "that he was representing himself" (R. 133), and when Mr. Holleran referred to the fact that the escrow had been deposited in consideration, among other things, for the dismissal by Holleran of a suit for damages against the Bon Air Country Club, Goldstein said he had no interest in the Club and "that that was his money and had nothing to do with the Club" (R. 133). Goldstein said, "It was my money that I put up and I want it back" (R. 133). He offered to pay $100 for release of the deposit (R. 133-134). On a subsequent date Goldstein, asked by Holleran whether the United States had any objection to withdrawal of the escrow answered "No, the Government had nothing to do with it; that it was his money and it was not in any wise involved in the Government case." Again, on another occasion he insisted to Mr. Holleran, "All I am interested in is my money. It is my money I put up and you can't deliver under the contract and I want my money back" (R. 135-136).

The deposition of John W. Guild, the real estate trust manager (R. 138) who was also present at the conference in the office of Mr. Holleran early in the month of November, 1940, also states unequivocally (R. 141): "Mr. Goldstein said that he wanted the return of his money that was on deposit in escrow." Goldstein made no statement that he was representing any individual other than him-

[22] This associate was not called upon by the Government to furnish an affidavit denying any of the facts sworn to by Holleran.

self and said "he was the owner of the money" (R. 141). Mr. Guild also received from Goldstein a written demand for return of the money (R. 141). And the same question-and-answer affidavit of Mr. Guild affirms that Goldstein did at the conference in Holleran's office "at that time state that the money was his and that he wanted it returned * * *."

Goldstein does not deny that he made these statements. He merely says (R. 252), "I do not recall at any time stating that it was my money".

There is thus a square conflict between Goldstein's trial testimony that "I received it [the $10,000 currency] from Johnson" (2 MR. 61) and his reiterated statements that it was his money. Defendants do not misapprehend what Goldstein's testimony was (Cf. Gov't Br. 67-68). The Government leaves the fact of direct conflict with Holleran and Guild unanswered (Br. 54-56). The arbitrary attitude of the trial court is well-exemplified in its purportedly "exhaustive review of all of respondents' motion evidence" (Cf. Gov't Br. 61). That court in what purports to be a resume of the affidavits of Holleran and Guild fails even to allude to these unequivocal sworn statements that Goldstein told them that the escrow deposit was "my money" (R. 490-491, 499, 501).

Moreover, although Goldstein claimed he held all of Johnson's money under an Internal Revenue lien, notice of which he claimed was served early in 1940 (AR. 252, 260-261), he offered to pay $100 to release this deposit (R. 133). Such a lien runs against "all property and rights to property, whether real or personal, belonging to such person" (26 U. S. C. sec. 3670). The question arises: Are we asked to believe that Goldstein was volunteering $100 of his own money to regain money for the Government?

The actions of Goldstein and his statement to Fowler were inconsistent with his testimony as to the $7,500 escrow.—Goldstein testified at the trial (2 MR. 61):

> "The amount of money involved was $7,500, deposited at the State Bank of Evanston, in the form of currency, by myself, which I received from Mr. Johnson."

Shortly after the trial and on October 30, 1940 Goldstein withdrew this money from escrow, giving his receipt (R. 185). Goldstein told Fowler that the $7,500 escrow deposit belonged to him and later told Fowler that he had withdrawn it (R. 214).

There is no mistaking Goldstein's testimony. He said that the money involved was "$7,500 * * * in the form of currency * * * which I received from Mr. Johnson" and in his conversation with Fowler he stated he "had $7500 in escrow in a Bank in Evanston" (R. 214). He actually withdrew the $7500. Admittedly after four years he had still given no notice to Johnson that he had withdrawn this money (R. 235, 253).

The trial court said with respect to the $7,500 escrow deposit, "The taking of the money down shows no more than the putting of it up and adds nothing that is not merely cumulative" (R. 513). The court thus utterly disregards our pertinent evidence on the point.

The opinion of the circuit court of appeals after careful consideration of the affidavits with respect to each of these escrows concludes, "These facts and circumstances persuasively point to the falsity of Goldstein's trial testimony that these deposits were the property of Johnson" (AR. 221-222).

The actions and statements of Goldstein were inconsistent with his testimony as to the "Dells".—At the trial Goldstein testified that the "Dells" property tract, constituting

eight acres, was bought for $10,000 and that four adjacent acres were acquired for $9,000. He said (2 MR. 59):

> "I received that $10,000 from Mr. Johnson in the form of currency and purchased that property at his request.
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> * * * * * *
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> $9,000 was involved in that transaction. I purchased the property at the request of Mr. Johnson, from whom I received the money deposited with the Chicago Title and Trust Co., in the form of currency."[28]

The affidavits presented on the motion for new trial show that Skidmore handled the purchase of this property personally with Goldstein and one Sam Hare who told Skidmore the property could be purchased cheaply (R. 117). They dealt through Eli Herman, attorney for the property owner (R. 117, 231). The owner, one Fred Huscher, was told by Goldstein that Skidmore was one of the prospective purchasers (R. 178). Goldstein denies he mentioned the name of the purchaser (R. 260). Skidmore himself inspected the property and talked with Huscher, promising to let Huscher have all of the old iron and personal property on the premises (R. 178). Skidmore agreed to buy at a Sunday conference with Goldstein, Herman, and Hare, and at that time offered $10,000 in cash to Goldstein for deposit in escrow (R. 231). After the deal was closed, Skidmore removed iron, concrete lamp posts, and tables and chairs from the property (R. 175, 177, 178). Skidmore paid Goldstein $750 (2 MR. 67) and Hare $500 for services (R. 118), and Herman, through Goldstein, $300 attorney's

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[28] The Government now contends that no one on the jury could have believed from Goldstein's testimony that Johnson was the sole owner of the Dells and of 9730 Western Avenue (Gov't Br. 1[illegible]). Yet, the Government admits (Gov't Br. p. 24) that it has charged him with being the sole owner of the properties and renews that contention again in this Court solely on the basis of Goldstein's testimony (Gov't Br., App'x B).

fees (R. 232). A memorandum receipt in Skidmore's handwriting listing the costs of acquisition of the property including payment for services to Goldstein, Hare, and Herman in the amounts each admittedly received (Def'ts' Ex. J-3, R. 157, 2 MR. 66) refers to all of the costs of acquisition as "paid out" and shows receipt of $10,000 and $1,057.95 presumably from Johnson who testified he had agreed to purchase a one-half interest with Skidmore (3 MR. 955).[24]

Statements, affidavits and tax returns filed by Goldstein with respect to the Albany Park Bank Building are inconsistent with his trial testimony and also inconsistent with each other.—Goldstein at the trial testified (1 MR. 56-57):

> "I did have something to do with the purchase of the property known as the Albany Park Bank Building at 3424 Lawrence Avenue. * * * I was requested by Mr. Johnson to go out there and purchase the building for him. * * * I received the money from Mr. Johnson in the form of currency. * * * I purchased that property at the request of Mr. Johnson. The exact amount of money expended for the purchase of that property I think was around $59,800. * * * I got that from Mr. Johnson in the form of currency. Title to that property was taken in the name of Ted W. Goldstein, my son. *Subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son.* This Albany Park Bank Building property was purchased July 16, 1937." (Emphasis supplied.)

The trial court accurately paraphrased this testimony as follows (R. 512):

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[24] After Goldstein had identified this memorandum receipt to Johnson in Skidmore's handwriting which itemizes the various costs of acquisition of the "Dells," and after Goldstein had admitted Johnson received only a half interest in the 9730 Western Avenue property, defendants moved to reserve cross-examination of Goldstein on the other properties since they were taken by surprise. This motion was denied. On objection of the United States Attorney and when counsel sought instruction to the witness to remain in the jurisdiction, the court reaffirmed that no further cross-examination would be permitted (2 MR. 67, 68).

> "Goldstein testified on the trial that he purchased this property for Johnson and paid for it with currency given him by Johnson; that he took title in the name of his son Ted Goldstein, and subsequently caused a quit-claim deed to be delivered to Johnson."

Important and not to be overlooked is the statement of Goldstein that a quit claim deed was delivered to Johnson.[25] Johnson testified (2 MR. 955):

> "I do not own the Albany Park Bank Building or any part of it, and I did not employ Goldstein to buy the property for me and never gave him any money to make the purchase and no deed was ever delivered to me.[26]

The statement that a quit claim deed was delivered to Johnson was obviously to support the testimony that the money was received from Johnson. Delivery of the money by Johnson to Goldstein was impossible to disprove directly other than by contradiction by Johnson. To show the

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[25] The Government complains that defendants have erroneously conceived Goldstein's testimony to have been that Johnson was "the sole owner" of the several properties. (Gov't Br. 84-85).

In the light of the testimony of Goldstein we believe he did in effect testify that Johnson became the owner of the Albany Park Bank Building. Certainly his testimony states all of the elements that are deemed necessary to support a conclusion of ownership by a jury or by a witness (if such conclusion by a witness is permissible).

The circuit court of appeals said (AR. 211): "In our opinion, the government makes an ill-advised attempt to escape defendants' contention that Goldstein testified that Johnson was the owner of the properties in question but embraced nothing more than the bare fact that in the purchase of the various properties involved the money for such purchases was received from Johnson. Especially is this true in the light of the fact that the cornerstone of the government's case was that Johnson was the owner. Based largely on Goldstein's testimony, the government has succeeded in convincing the jury and court after court that such was the case." The district court on motion to modify the order stated with respect to the government's contention that Johnson purchased the property (AR. 178): "I don't think there is any doubt about it. He owned it. I never had any doubt about it." Answering contention of counsel that the building was not owned by Johnson the court said (AR. 179): "You haven't shown that. The evidence is overwhelming that it was. He said he did. His counsel said he did."

[26] The Government, like the trial court (AR. 166) relies heavily on the opening statement of Judge Thompson, counsel for Johnson at the time of the trial, to the effect that Johnson owned an interest in the Albany Park Bank Building (Gov't Br. 16, 37, 41, 43, 78, 86). This same point has been raised and an-

falsity of this testimony, however, evidence demonstrating that Goldstein falsely swore with respect to delivery of the deed to Johnson demonstrates a false swearing in an important particular with respect to this property.

In proving such falsity defendants are not concerned whether the proof shows that Goldstein, his son Theodore, or Skidmore was the actual owner. Defendants show merely that Goldstein in stating that there was a quit claim deed to Johnson (and thus supporting his other statements of receipt of the money from Johnson) swore falsely. Defendants' proof with respect to this property goes not only to show that Goldstein swore falsely at the trial but as well to show that he swore falsely in later affidavits or in the income tax returns he filed on behalf of his son. These make plain that Goldstein cannot be believed under oath at any time.

On the original motion for new trial, the affidavits and other evidence in support of the motion showed that title to the Albany Park Bank Building was transferred to Ted Goldstein, William Goldstein's son, on July 6, 1937 (R. 151-152) and the deed was recorded July 9 (R. 151). The stock

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swered repeatedly. The Government did not rely on this statement at the trial. "Where the party is in a courtroom and the trial or other judicial proceeding is going on, the failure to deny statements made public by another person in the course of the proceedings would obviously admit of no inference against him whether he attends as party or merely as witness; and in either case he is prevented by the dictates of decorum from making open interruption and he knows that he may at the proper time make all necessary denials." 4 Wigmore, *Evidence* (3d ed.) sec. 1072, p. 86. When Johnson took the stand, he corrected and withdrew the admission of his counsel by an express denial that he owned the building and by his testimony that he did not employ Goldstein to buy it and never gave him any money to make the purchase (2 MR. 955).

In his reply brief in answer to the contention, for the first time there raised by the Government, that this statement was to be considered in the circuit court of appeals on the original appeal, Judge Thompson fully explained the reason for his inadvertent statement and retracted it specifically (R. 334). As Judge Thompson there pointed out, this was not an admission made during the course of the trial for the purpose of dispensing with proof and the prosecution did not rely upon the statement as an admission or as taking the place of proof. Some indication of the desperate stance in which the Government finds itself is afforded by the fact that the Government deems it necessary to resort to impugning the ethics and integrity of counsel, no longer in this case and hence unable to here defend himself, despite the fact that he has honorably served as Chief Justice of the Supreme Court of Illinois, President of the local bar association, and is a member of the bar of this Court in good standing.

of the Albany Park Safe Deposit Vault Company was also transferred to Ted Goldstein as a part of the same transaction. By an instrument dated July 7, 1937, and reciting that he had purchased the property from the Albany Park Safe Deposit Vault Company, Ted Goldstein leased part of the same premises back to the Vault Company for one year for a so-called consideration of $10.00 and "other good and valuable considerations" (R. 154). In September 1941 Goldstein, executing the instrument as agent for his son Ted, leased the building for a period of five years from October 1, 1941 to the Hines Realty & Construction Company, of which one Frank Sampson was and is the president (R. 202-204). Attached to the lease is a rider providing among other things for the transfer to the lessee of all the stock of the Albany Park Safe Deposit Vault Company, the resignation of all the Vault Company's officers and directors, and the delivery of its books of record (R. 205). The books of the Vault Company show that William Goldstein and Louis Levinson resigned and were succeeded by Frank Sampson and others (R. 201). Since that time Goldstein has collected the monthly rents of $250 (commencing October 1943, $300) under the lease and has cashed the rent checks for his private account after endorsing them "William Goldstein, Agent" and then "William Goldstein" (R. 199, 200-201).

It is important with respect to the facts above recited and the facts that follow to note that Goldstein in affidavits submitted in opposition to the motion for new trial stated that in the early part of 1940 he was served with a notice of lien by the Internal Revenue Collector's office to hold all moneys and property belonging to William R. Johnson and that he was retaining the rent moneys because of such notice (R. 252, 261). The fact that he transferred the vault company stock to the Hines Company in making the lease

In 1941 after service of the notice of lien (R. 202-204), shows that he did not consider this stock to be Johnson's although it was acquired as part of the same transaction for which he said Johnson gave him the money.

In July 1943 the County Treasurer instituted a tax receivership proceeding against the property (R. 198-199). Goldstein offered on July 26, 1943 to pay $150 per month to apply on the delinquent real estate taxes and on the next day, July 27, offered to pay $250 per month to apply on the delinquent taxes [27] Both of these offers were refused (R. 198-199). This can be explained only on the theories (1) that he had not given Johnson a quit claim deed to the property and the rent moneys were therefore not Johnson's, or (2) that Goldstein was volunteering money out of his own pocket since all of Johnson's money was by him stated to be 'subject to lien,' or (3) that there was no lien filed by the Government. The Government by presenting the affidavits vouches for the existence of the lien, and it is in its nature incredible that Goldstein after this trial would in effect contribute money from his own pocket to pay Johnson's taxes (in the light of the Government lien on all rent income). At the insistence of the County Treasurer's office, he paid a premium of over $300 for insurance on the property (R. 206-212). It is also clear by the same process of elimination that this payment is explainable only on the theory that Johnson had no interest and Goldstein was paying the money for himself or on behalf of his client Skidmore. On two different occasions, July 27 and July 28, Goldstein, in demanding termination of the receivership,

[27] A patent absurdity is the suggestion of the Government (Br. 102) "The very fact that a tax lien came into existence after the trial indicates that the true owner can hardly be Goldstein." Aside from the fact that the evidentiary issue is simply whether the owner was or was not Johnson, it is obvious that the state tax lien would, regardless of owner arise against the property if the real estate taxes were not paid.

unequivocally asserted to Blockus, an employee of the County Treasurer, that he was the owner of the property, stating, "That is my building," "That is my property," "The property is mine, you will have to remove the receivers from my property" (R. 198-199). Goldstein also asserted that the Federal Government had a lien against the property and if the County Treasurer did not accept his offer of $250 per month he (Goldstein) would turn the property over to the Government.[28]

The trial court (R. 493) wrongly confined the Leo Blockus affidavit to conversations on July 28, 1943 and relied on affidavits of Levine and Frank Sampson that they attended the Goldstein-Blockus conference on that date and did not hear Goldstein make these statements.[29] The trial court's opinion ignores the fact that the Blockus affidavit clearly states that the same representations as to ownership were made by Goldstein on the prior day, July 27 (R. 198-199). This was uncontradicted save by Goldstein.

The circuit court of appeals (AR. 214) pointed out there was no answer to the question: If Johnson had been deeded the property—"why was Goldstein so interested in pre-

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[28] The offer of $250 per month from the rentals was inconsistent with the assertion of the existence of the lien. The tax lien extends to "all property and rights to property, whether real or personal" belonging to the taxpayer (26 U. S. C. sec. 3670).

[29] The circuit court of appeals (AR. 214) pointed out that the affidavits of Leon J. Levine and of Frank Sampson (R. 262-263) related only to the conference on July 28 and while they therein stated that they did not hear Goldstein tell Mr. Blockus that the property was his, it is significant that Levine by a subsequent affidavit (R. 262) admitted that he could not know what was said between Goldstein and Blockus as they had been talking before he arrived at the office of the County Treasurer. Levine further stated that Mr. Sampson did not arrive until after Mr. Levine did (R. 228-229).

The court also pointed out that strong corroboration for Blockus appears in the very fact that Goldstein was at the Treasurer's office attempting to settle the claim for taxes. It said (AR. 218):

> "If, as he testified at the trial, this property belonged to Johnson, why was Goldstein so interested in preventing the property from being sold at tax sale?"

venting the property from being sold at a tax sale? Blockus certainly could have had no motive in making a false affidavit as to what Goldstein stated, and we see no basis for a finding other than that his testimony was true and that of Goldstein false."

The affidavit of Frank Sampson submitted in support of the amended motion for new trial (AR. 76-79) showed that January 3, 1944 a new lease of the same building for a period of ten years beginning October 1, 1946, was executed by Theodore Goldstein (AR. 79-81). This affidavit shows that Goldstein in November 1943 refused to give an option for extension of the existing lease until the court ruled in the "Johnson case" then pending before Judge Barnes (AR. 77). To a direct inquiry by Sampson, Goldstein replied, "Johnson never had any interest in the property and has nothing whatever to do with it" (AR. 78). It cannot reasonably be argued that this denial that Johnson ever "had any interest in the property"[39] is not directly in conflict with Goldstein's trial testimony that he delivered a quit claim deed to the same property to Johnson. The Sampson affidavit is important also in that it shows he demanded of Goldstein that the lease be "signed by his son, Theodore Goldstein, who was the owner of the property rather than William Goldstein, as agent * * *," and pursuant to this request William Goldstein procured the signature of his son as lessor (AR. 78). These statements are opposed only by the denial of William Goldstein (AR. 100).

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[39] The Government explains this affidavit with a rare bit of speculation for which not even a slight basis in fact is suggested (Br. 103): "* * * it seems reasonable to conclude that Goldstein made some sort of statement that was misinterpreted by Sampson, such as that Johnson *had never taken* any interest in the building and *has had* nothing whatever to do with it." Aside from its sheer frivolity, such an hypothesis is conclusively negatived by the affidavit of Goldstein himself (AR. 100): "I never did make such a statement to Sampson or *any statement like it.*"

There is no suggestion of motive on the part of Sampson to lie. The trial court although it noticed this affidavit (AR. 162-163), did not discuss it. The trial court merely asserted that the new lease had no greater evidentiary value than the earlier one (AR. 166-167).

The circuit court of appeals said:

> "We suppose according to this reasoning, if Goldstein should lease this property from now until eternity and retain the rents as long as he lives, it would not be inconsistent with his testimony that he purchased this property for and conveyed the title to Johnson. Further, it would not be inconsistent with the Government's theory that Johnson was the owner. We do not agree with such reasoning. We think this circumstance alone, unexplained as it is, comes close to establishing the falsity of Goldstein's trial testimony" (AR. 220).

It is pertinent to note that Goldstein in his affidavits on the original motion for new trial states that he is holding the rent moneys collected under the lease made in October, 1941 and the $7500 escrow moneys returned to him by the State Bank and Trust Company of Evanston subject to the "notice" of lien by the United States served on him in the early part of 1940 (R. 252, 261). But Goldstein makes no claim that he ever was authorized to act for Johnson as agent in the management of his property. He admits that he has never made any report to Johnson concerning the rentals and has never advised Johnson of the fact that the building was rented or tendered any of the rents to him (R. 253).

Miss Sommer, an employee of Goldstein from January, 1938 to June, 1939 swore that Goldstein caused income and disbursement statements "of the operation of the Albany Park Safety Deposit Vault Co." to be prepared monthly in

his office and forwarded to William R. Skidmore (R. 165-166).[31]

To show falsity of Goldstein's testimony respecting the Albany Park Bank Building, important new evidence was adduced on the amended motion for new trial, namely: the delinquent tax returns for the years 1937-1940, and amended returns for 1941-1943 (Exs. C-1 to C-7 inclusive (AR. 47-74)) signed by Theodore Goldstein and filed for him July 17, 1944 and September 23, 1944 and the tax thereon paid by William Goldstein as his agent (AR. 99, 102). In evaluating the probative effect of these returns it is important to have in mind that the motives of William Goldstein may well have suffered modification by reason of the death of William Skidmore on February 19, 1944 in the federal penitentiary at Terre Haute, Indiana. With the death of Skidmore there was open for Goldstein the possibility of retaining the title and the income from the Albany Park Bank Building. Admittedly his son had record title, Johnson had denied title, and Skidmore was no longer alive to claim it. Furthermore, if Skidmore's estate should claim it—and Goldstein continued to act for the estate—the additional tax on income for 1937 consequent upon inclusion in Skidmore's income for that year of an amount equal to the purchase price of the Albany Park Bank Building coupled with ordinary interest and the 50% fraud penalty (26 U. S. C. sec. 293(b)) would obviously make the cost of claiming it for the estate exceed its value. Goldstein may well have thought that by virtue of his services to Skidmore and the risks taken in his behalf he had earned

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[31] The Government's suggestion (Br. 52, n.) that the Sommer affidavit is refuted by Goldstein's submission of typed copies of income and disbursement statements prepared by a Miss Koop, an employee at the Vault Company (Br. 52, n) overlooks that a real estate agent transmits only a summary statement; the longhand statements prepared by Goldstein and typed by Miss Sommer (R. 166) were undoubtedly made up by him from the Koop detailed statements. The trial court dismissed this affidavit as cumulative, again overlooking that it was directed to a different issue.

the right to have this property. Apparently, it was necessary only for William Goldstein to agree to the payment of taxes on the rentals thereon by his son in order to preserve to him the benefits of such total ownership. At the time it may have seemed to him a safe and profitable solution. These returns, if true, are the first deviation in the evidence from the theory that the purchase money was probably supplied by Skidmore; if false, they are completely consistent with Skidmore's ownership but are inconsistent with the possibility of Johnson's ownership. Cf. appellate court opinion (AR. 219). It is unimportant whether they support the theory of title from 1937 in Skidmore or in Goldstein *The salient feature of all the evidence is its confirmation that Goldstein lied when he said that he bought the property "for Johnson" and that "subsequently there was a quit claim deed delivered to Mr. William R. Johnson by my son"* (2 MR. 57).

The affidavit in question and answer form of Stanley A. Wodrick, a zone deputy collector, filed by the Government in opposition to the amended motion (AR. 102-108) shows that he was assigned to investigate an anonymous telephone communication stating that "the income from the building at 3432 Lawrence Avenue is not reported by anybody and supposedly the rents are paid by the different organizations occupying the property to a William Goldstein, who claims he is agent for Theodore Goldstein." Wodrick interviewed Mr. Goldstein who, when asked who was the owner of the building at 3424 Lawrence Avenue, answered (AR. 103):

"I do not know the owner."

Mr. Wodrick told William Goldstein that since his son was shown by the records to be the owner, he was the person who was to report the rents received from the building.

William Goldstein objected, stating that Theodore was not the actual owner but—

> "after a few days, Mr. William Goldstein *agreed* to have the returns prepared for Theodore Goldstein, showing rent income from the Albany Park Bank Building for the years 1937 through 1943. Mr. William Goldstein said that the reason he *was agreeing* or *wanted to agree* and prepare these returns for his son, Theodore Goldstein, was that he would like to have the matter closed as soon as possible" (AR. 104) (Emphasis supplied).

The affidavit goes on to show that at the time it was made Wodrick had already prepared tax returns for the years 1937-1939 showing no tax due and had requested copies of the transcripts of the returns already made for 1940 through 1943. The affidavit reiterates that Mr. Goldstein had declared he did not know who owned the property and had stated that—"he received money from persons unknown for the purchase of that building. [(AR. 104)] He also stated that *he didn't know whether it was Skidmore's or Johnson's money.*" In a second affidavit prepared and filed the same day as the answer to amended motion for new trial, December 7, 1944 (AR. 109-110, 87), Wodrick repudiated his affidavit that Goldstein "stated that he received money from persons unknown for the purchase of that building." The Government was obviously dissatisfied with some of the assertions in Wodrick's first affidavit but except for the single correction the affidavit stands. Therefore doubly asserted by Wodrick stands his uncontradicted assertion that Goldstein said that "he didn't know whether it was Skidmore's or Johnson's money" (AR. 104). The fact that Goldstein himself, with no prompting or reference to Skidmore by the agent, brought Skidmore's name into the discussion is highly significant. It is submitted that this statement alone shows that Goldstein's

testimony with respect to the Albany Park Bank Building was both false and misleading, the basis of a fraud and an imposition upon the trial court and the jury. The pertinent portions of the affidavit also state (AR. 105):

> "I asked Mr. Goldstein whether the rent money was held in an account for the purpose of returning that money to the person or persons to be later identified as the owners of the building. Mr. Goldstein replied that he merely kept the money, but did not have a special account for that purpose."

Goldstein thus made the damaging admission that he had never segregated the rent moneys from his personal account but had commingled the funds, an act legally inconsistent with ownership in Johnson and with his affidavit that the rent monies were Johnson's and were being held by Goldstein subject to Government lien (R. 252). *People* v. *Hachtman*, 350 Ill. 326, 329.

The Wodrick affidavit also reiterates (AR. 105):

> "The first time he was approached on the subject, he disagreed, stating that Theodore Goldstein was not the actual owner. However, after a few days, I called on William Goldstein and at that time he *agreed* to have the returns prepared in the name of Theodore Goldstein." (Emphasis supplied.)[32]

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[32] The affidavit also refers to the fact that a statement prepared by Edward H. Schultz, the division chief, in which William Goldstein was referred to as agent for his son Theodore (Gov't Ex. 2-A, AR. 101) for signature by William Goldstein was objected to because it contained the words "the owner" and "purchased for my son, Theodore, in 1937." It was then suggested that Goldstein prepare his own statement and properly sign it (AR. 107; Gov't Ex. 2-B, AR. 101-102). This statement was apparently prepared in order to remove the doubt created by the form of the anonymous telephone call stating that the rents were paid to William Goldstein "who *claims* he is agent for Theodore Goldstein." Of course the tax payable by Theodore Goldstein who had no other income in some years and relatively little in others would be much less than that payable by William Goldstein who presumably enjoyed a substantially greater income.

Compounding of falsehoods by Goldstein results in inconsistencies such as that between the assertion in this statement that the Vault Company paid the real estate tax for 1939 (AR. 102) whereas the return claims a loss for that year by reason of payment of the same taxes by Ted Goldstein (AR. 56).

The Government on the same day obtained an affidavit (AR. 89) from Theodore W. Goldstein denying that he was the actual owner of the property and stating he signed the returns because his father told him that the Internal Revenue Bureau had insisted that as record title holder he was required to file amended and delinquent returns for the property in question, and that unless such returns were filed an assessment would immediately be made against the affiant. The affidavit is notable for its deliberate failure to refer to or otherwise confirm the father's testimony at the trial (R. 518) that "there was a quit claim deed delivered to Mr. William R. Johnson by my son."[33] Theodore also carefully avoided saying that he had at any time, or was at that time holding title as trustee for Johnson.

The affidavit of William Goldstein asserts that Mr. Wodrick called on him as many as ten times, and that Mr. Schultz, the division chief, also took the same position as did Mr. Wodrick that returns must be filed by Theodore for a tax period, and that he concluded that if returns were not filed and the tax paid, an assessment would be made against Theodore. He obtained the signature of Theodore to the income tax returns prepared by Mr. Wodrick and paid the tax thereon (AR. 99). The affidavit reaffirms the trial testimony generally and particularly restates that he got the purchase money "from Mr. Johnson in the form of currency." There is no specific restatement that his son

[33] This omission by Theodore to swear to a fact concerning which he was the Government's best available source of information creates a strong presumption that had he been required to testify on this point, the evidence would have been unfavorable to the Government, i. e. that William Goldstein lied at the trial (2 MR. 57) and that no "quitclaim deed [was] delivered to Mr. William R. Johnson by my son." (*Runkle v. Burnham*, 153 U. S. 216, 225; *Caminetti v. United States*, 242 U. S. 470; *Mammoth Oil Co. v. United States*, 275 U. S. 13, 51-52; *Interstate Circuit v. United States*, 306 U. S. 208, 226; *Johnson v. United States*, 318 U. S. 189, 196; *Choctaw & M. R. Co. v. Newton*, 40 Fed. 225, 238; *Henderson v. Richardson*, 25 F. 2d 225, 228.)

gave a quit claim deed to Johnson. This claim was evidently abandoned.

The returns (exhibits to amended motion for new trial, Exs Nos. C-1 to C-7) conclusively show that Theodore Goldstein by solemn statements[34] has averred ownership of the Albany Park Bank Building in himself by returning the rentals thereon as taxable to him. But he has gone further by claiming deductions for depreciation thereon, and, in years of loss, by offsetting such loss against his personal income from entirely different sources (see Ex. C-4 for 1940, R. 59-60). He has affirmatively asserted in himself an interest in the property which is not less than complete legal and equitable ownership. Particularly significant is the delinquent return for 1940 (AR. 59-62) in which Theodore Goldstein reported income on salary of $2600 received from an independent source, upon which he had never theretofore made a return but in which return he avoided payment of tax thereon by taking a loss of $1631.08 represented by the excess of depreciation and real estate taxes over the income of $900 on the building.[35] Unless he was the owner of the property, Theodore Goldstein by this return clearly laid himself open to a criminal charge of evasion of income tax by a false claim of ownership, a fact which he and his father as attorneys must have appreciated. It is inconceivable that he and his father would have incurred this risk if Johnson was the owner of the Albany Park Bank Building.

It is highly pertinent to note as well that the schedules explaining the deduction for depreciation appearing in each of these returns (AR. 48, 52, 56, 60, 72) show that the

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[34] Oaths required on returns 1937-1941 were subject to penal sanctions (18 U. S. C. sec. 231); affirmations to the returns for 1942-1943 were subject to the same sanctions (26 U. S. C. sec. 145(c)).

[35] The Government's unsupported contention that an agent may deduct taxes from rentals (Br. 102) even if it were correct, falls short of explaining how an agent may deduct such taxes from his own income from other sources.

date of acquisition of the property was July, 1937. Goldstein testified at the trial that the property was purchased July 16, 1937.

Gross income from the building was includable as Theodore Goldstein's income only if he was the owner since ownership is the established test for determining who is to bear the tax on such income. *Pollock* v. *Farmers Loan & Trust Company*, 158 U. S. 601; *Eisner* v. *Macomb*, 252 U. S. 189. Plainly the deduction for depreciation on the full value of the property from the date of its purchase by his father in 1937 and for later years could not be taken by Theodore if Johnson at any time held proprietary interest therein. I. R. C. sec. 23(l); Regs. 111, sec. 29.23(l)-1, 2. Depreciable property is limited to that in which the taxpayer has a special or financial interest. 4 Mertens, Law of Federal Income Taxation, secs. 23.06, 23.52, pp. 12, 68. The returns contradict the testimony of Goldstein at the trial that he purchased the property "for Johnson." They even more clearly repudiate Goldstein's testimony at the trial that "there was a quit claim deed delivered to Mr. William R. Johnson by my son."

William Goldstein is conceded to have had full knowledge of these returns, to have actively participated in and agreed to their execution and filing (see Affidavit of Wodrick, AR. 104). Goldstein signed the statement that he was authorized to pay any tax owed by his son on the rental income received from the property (AR. 102). Goldstein certainly knew all the facts concerning the purchase and ownership of the building. Being subject to the same penal sanctions for false swearing if the returns are false (26 U. S. C. sec. 379d) he is equally with his son Theodore chargeable with the admission and assertion contained in the returns that ownership was never in Johnson. Whether they conclusively prove that it was in Theodore Goldstein

or his father or Skidmore is unimportant. William Goldstein thus repudiated his testimony on the trial that he purchased the property "for Johnson" and that Ted Goldstein "subsequently caused a quit claim deed to be delivered to Johnson" (2 MR. 57).

The returns also demonstrate the falsity of William Goldstein's affidavit on the original motion for new trial (R. 252-253) averring that he was holding all rental moneys under a lien served by the Internal Revenue Bureau and demonstrated as well the falsity of his further statement in the same affidavit that Theodore W. Goldstein holds title to the building in trust for Johnson. The returns filed under oath constitute a solemn assertion of ownership, not only ownership of the beneficial but the legal title as well. If Goldstein had wished to preserve the fiction, and it was a fiction, that he had bought the property for Johnson and that his son had given a quit claim deed to the property to Johnson, he would never have permitted the filing of any such returns. To be consistent with his trial testimony that Johnson had received a quit claim deed, and consistent with the theory that Ted was acting merely as agent (R. 512) (Gov't Br. 51, 104) an agent's information return (Form 1099) could have been filed (26 U. S. C. sec. 147(a); Regs. 103, sec. 19.147-1; Regs. 111, sec. 29.147-1). On the other hand, to be consistent with the Goldstein affidavit that title in trust was held by Ted Goldstein and was not transferred to Johnson (R. 253) a fiduciary return (Form 1041) could have been filed (26 U. S. C. secs. 142, 162(b); Regs. 103, sec. 19.142-1; Regs. 111, sec. 29.142-1). In neither of these forms would there have been included any of Theodore Goldstein's individual income or his personal exemption. No tax would have been payable by him by reason of the income from the building since it was, according to William Goldstein, currently distributable by the

trustee to the beneficiary except for the lien of the United States. Or, as an alternative, he might have turned over all the accumulated rents to the Government, said they belonged to Johnson, and washed his hands of the entire transaction.

The Government sees "no justification for any other conclusion than that the returns and the circumstances surrounding their filing show nothing more than what Goldstein testified to at the trial—that his son Theodore * * * was the record title holder." (Gov't Br. 102).[36] The Government, without directly so asserting, seeks to create the inference that Wodrick acted on an improper basis in demanding and securing agreement to a return by Theodore after the latter's explanation that he was mere "record title holder" for whosoever owned the property. The Government labors its allegation that the Government agents insisted that Theodore file the return and pay the tax (Gov't Br. 102-103).[37] It ignores the statement of its own witness that William Goldstein "*agreed*" and stated that the "reason he was *agreeing* or wanted to agree and prepare these returns for his son, Theodore Goldstein, was that he would like to have the matter closed *as soon as possible*" (AR. 104). The trial court accepted the Government's contention that there inhered in the circumstances under

[36] The Government's suggestion that taxes are frequently paid first and contested later (Br. 102) in essence is a contention that the returns under oath mean nothing until the statute of limitations on claims for refund have run. Had a claim for refund been filed and a refund awarded on the ground of mistake such award might carry some persuasive weight but the Government cannot argue as though such an award had been made in the absence of even a claim for refund or any suggestion that such a claim would ever be filed, and indeed in the face of Goldstein's statement that the returns were made and the tax paid to *close* the matter. The trial court itself did not suggest that on the motion the statement and necessary implication of the return could not be given effect by the court.

[37] The Government's argument that the returns are not false because of the accompanying written statement that Ted Goldstein is "record title holder" (Br. 102) erroneously assumes that the statement includes the assertion, in fact entirely lacking, that some other person holds actual or beneficial title. The statement thus neither adds to nor takes away from the implications of the returns.

which the returns were filed some legal obstacle—then unnamed and still unnamed—that prevented attributing to them the evidential effect that they would otherwise have (AR. 152, 165). No suggestion is made that the returns are invalid as the result of fraud, duress or mistake.

Goldstein himself secured his son's signature. They acted jointly and deliberately. Neither Wodrick, nor anyone else was present to intimidate them and force them to do something against their will. Both were lawyers and knew the consequence of their acts. Moreover, Goldstein was anxious "to have the matter closed as soon as possible," placed in the confidential files of the Government and forgotten.

Some principle of exclusion more definite than the vague allusion to the "circumstances" must be evolved as a basis for rejecting this plain and compelling evidence of perjury by Goldstein. Otherwise these defendants are denied their plain right and are left without relief through arbitrary whim or caprice.

The circumstances surrounding the filing of the returns and the facts shown to have been uncovered in Wodrick's investigation, far from disputing the legal implication of ownership asserted by the returns, constitute a much stronger case against the Goldsteins for income tax evasion had Theodore refused to file returns, than was made out in this case against any of the defendants.

Goldstein has made admission to Green that his testimony is false.—Green in his affidavit of June 24, 1943, as pointed out above, states unequivocally that in a number of casual conversations since October 1940 Goldstein admitted that his testimony at the trial regarding pur-

chases of property for Johnson were false (R. 100). The same affidavit shows that about March 15, 1942, Goldstein stated to Green and Skidmore that the latter could not file an answer to the partition suit (brought by Johnson in the early spring of 1942 in an attempt to force disclosure of Skidmore's interest (R. 240)) because "such an answer in the Partition suit would definitely establish his testimony in the trial of William R Johnson as completely false". Skidmore agreed and therefore did not file an answer (R. 101). This is confirmed by the affidavit of Henrichsen (R. 90) who states that during the early part of March he was served with a summons in a case involving the property of the Bon Air Club and the Curran Farm; that Skidmore stated to him that he would not contest the suit involving the property at that time; that he (Skidmore) had in his possession unrecorded quit claim deeds to the Bon Air property and to the Curran Farm and would assert his rights at a later date; and if any more papers were served on Henrichsen pertaining to Bon Air, Curran Farm, or White House, to take all such papers to Mr. Goldstein (R. 90). Admittedly Skidmore interposed no defense in the suit to protect his ownership in the property.

Again in a later affidavit made August 13, 1943 (R. 216) Green states that on August 11, 1943, he met Goldstein outside the bakery where the former was employed and Goldstein upbraided him for making the prior affidavit which had been filed in the circuit court of appeals on the motion for remand, but when Green said Skidmore should tell Goldstein to tell the truth, Goldstein said:

> "I can't do that because if I did I'd certainly be disbarred, and I might as well be dead as disbarred" (R. 216).

Green's affidavit shows unequivocal recantation.

Goldstein's affidavit, September 8, 1943, in answer to Green's of June 23, admits the occasional meetings with Green but denies the admissions of false swearing (R. 243). Goldstein in his affidavit dated September 1, 1943 (R. 264) denies entirely the meeting across from the bakery to which Green swears, but proof that Goldstein did meet Green at the bakery is found in the affidavit of the completely disinterested Engelbretson[38], proving Goldstein's denials false and corroborating Green.[39]

Goldstein admitted to Hess that his testimony was false. —Goldstein admitted in the presence of Hess, defendant Johnson, and his brother John E. Johnson, that he lied on the stand, saying "he was sorry that he did but that he was a victim of circumstances" (R. 126, 221, 233).

The Hess affidavit states (R. 127) that Johnson inquired of Goldstein—

> "as to why he testified that 'he bought those properties for me when you know you bought them for Skidmore. Why did you lie?' Goldstein replied in substance that he was sorry that he did but that he was a victim of circumstances and stated that he preferred not to discuss the matter."

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[38] The Government finds a flyspeck discrepancy in the Engelbretson corroboration (Br. 40, fn. 10). The Government's attack because of minute discrepancy, on the affidavits of Green and Engelbretson is in marked contrast with its attack on those of Hess, Johnson and John E. Johnson, because of their similarity (Gov't Br. 35).

[39] The trial court held (R. 478) Green discredited by the number of opportunities he gave himself to talk to Goldstein and by the improbability that Skidmore would seek the advice of a disbarred lawyer and bakery goods salesman on a question of real estate law. The Government makes the same attack (Br. 40) but Goldstein admitted seeing Green on a number of occasions (R. 243). The remaining reason of the trial court ignores the fact that the so-called question of "real estate law" was really the problem of how Skidmore could protect his ownership, protect Goldstein from disclosures of his perjury concerning the ownership, and avoid possible indictment of himself and Goldstein for conspiracy to evade income tax on the income represented by it. Advice on law evasion might well subject the counselor to disbarment and a conspiracy indictment as well. Green was not disbarred for incompetence. What more likely than that Goldstein and Skidmore would seek out a disbarred lawyer who presumably would have so much less to lose by the giving of such advice? Even though they had selected a disbarred lawyer for this purpose, it is obvious and to Green's credit that he refused to be a party to the scheme.

In an interview with a Bureau special agent, Hess refused to clarify the statement as to Goldstein's answer since that was his best recollection.

> "Whether Goldstein was endeavoring to excuse himself to Johnson for having testified against Johnson, or was conceding falsity, Mr. Hess would not say" (R. 246-247).

Obviously such a conclusion by a witness would have been grossly improper and Hess merely recognized the fact.[40] Judge Barnes interpreted this to mean that Goldstein was "sorry he testified at all" (R. 478). This untenable distortion of the Hess affidavit ignores that Goldstein's answer was not addressed to any question as to why he testified. He was asked "why he testified that 'he bought those properties for me [Johnson] when you know you bought them for Skidmore.'" "Why did you lie?" (R. 127.)

Both interrogations asked why Goldstein lied. Goldstein's answer that he was sorry he did, regardless of the question to which it is deemed addressed, is equally damning and manifestly does not permit of the strained effort of Judge Barnes to avoid the inconsistent statement of Goldstein.

The circuit court of appeals, recognizing the tenuous nature of the district court's interpretation, was amply sustained in its holding that "any kind of logic or reason of which we are aware requires the acceptance of Hess' version as true and that of Goldstein as false" (AR. 213).

The record affords no corroboration for Goldstein.—It is highly significant that since July 13, 1943, when re-

[40] Assuming, without conceding, that the affidavit of Hess permits of the strained inference made by the trial court, it is nevertheless clear that "It is not allowable for a witness to resolve the doubt as to which of two equally justifiable inferences shall be adopted by drawing a conclusion." *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 340. Plainly, this principle may not be circumvented by drawing an inference from the failure of the witness to draw the unallowable conclusion.

spondents first presented their motion to the circuit court of appeals for remand supported by all but two of the affidavits upon which they relied in the trial court, the Government has been unable to bring forward a single witness to support Goldstein in his numerous denials of the affidavits of ten or more of the witnesses presented by the respondents. Although the Government insists that the evidence brought forward by respondents is merely impeaching, its only support for Goldstein lies in his affidavits in attempted reiteration of his trial testimony, and there are obvious inconsistencies in these as pointed out above.

The Government insists that Goldstein's testimony was in large part corroborated by the trial record (Gov't. Br. 16, 17, 20, 92, 93, 96, 102). Most frequent reference is made to the purchase of Sunny Acres Farm and adjoining DuPage County real estate. Goldstein testified that Johnson asked him to take up the matter of the purchase of Sunny Acres Farm with the seller's representative, but that after a price was agreed upon, Johnson personally brought the money to the bank where the escrow was executed and with Goldstein counted the money out. Title was taken in the name of Johnson (2 MR. 60). Johnson confirms this (3 MR. 982-983). As to the adjoining DuPage County property, Goldstein testified that he bought the property at the request of Johnson with money given to him by Johnson and took title in the name of his law partner, Isadore Goldstein. Subsequently, a quit claim deed was delivered to Johnson (2 MR. 60). Johnson merely testified that Goldstein handled the purchase for him (3 MR. 982). Johnson's purchase and ownership of Sunny Acres Farm and adjoining Du Page County real estate has never been denied by Johnson. There was no controversy about the ownership, the cost or the method of acquisition of these properties. The facts concerning these properties can only be urged

as corroboration of Goldstein on the theory that if Johnson utilized Goldstein in the purchase of two parcels of property he must be assumed to be the owner of all the real estate Goldstein ever purchased.

There is no validity in the Government's argument that because Johnson testified that Goldstein bought the Du Page County real estate for him and Goldstein testified that he purchased that property with currency received from Johnson and with title taken in the name of a nominee and quit claim deed subsequently delivered to Johnson, the evidence of this purchase corroborates Goldstein's testimony that Johnson gave him the money for the purchase of 9730 Western Avenue, the Dells, Albany Park Bank Building, and Bon Air, since in each instance the same pattern of concealment was used by Goldstein: payment in currency, title taken in the name of a nominee and quit claim deed subsequently delivered to Johnson (Gov't Br. 19-20, 25, 93, 96, 101.[41]

It is quite obvious that on the two parcels of property in the purchase of which Goldstein acted for Johnson radically different "patterns" were employed. In one Johnson himself paid the money to the agent for the seller, took title directly in his own name. In the other relatively minor transaction Goldstein purchased the property, took title in the name of a dummy and gave Johnson a deed. Johnson openly acknowledged to the world his full ownership of both these parcels of property. These transactions

[41] The Government also urges repeatedly that because Goldstein's testimony as to the purchase of Sunny Acres Farm and adjoining DuPage County property was true, this makes against acceptance of the Green affidavit that Goldstein made a general admission that his testimony "regarding purchases of property" for Johnson was false (Gov't. Br. 41, 96). Green did not say that Goldstein told him that every single word he uttered concerning the purchase of any property whatsoever for Johnson was false, and the defendants have made no contention to this effect. Green said Goldstein admitted committing perjury regarding purchases (R. 100) and the record evidence shows that on every contested statement Goldstein testified falsely.

can hardly be a basis for an inference that Johnson always purchased property in the name of a nominee and concealed his ownership in it. They may, however, afford basis for an inference that Goldstein, left to his own devices as a purchase agent for any client, took title in the name of a dummy and gave his client a quit claim deed. In any event no inference can be drawn from these transactions which in any degree corroborates Goldstein's controverted trial testimony.

The Government also relies heavily on the opening statement of Johnson's attorney, Thompson (Br. 17-19). The repudiation of this statement has been pointed out above (supra, p. 50, n. 26). The Thompson statement, as quoted by the Government (Br. 18), includes an indication of an omission which is peculiarly important. The omitted portion of the sentence reads: "the Government says in this indictment", (2 MR. 4). This supports Mr. Thompson's statement made to the Circuit Court of Appeals that he based his opening statement on what he was able to learn in the few hours between the time he was retained on the afternoon of the day before the trial, and the time he gave his opening statement (R. 534). In part, this was based on what the Government said in the indictment and in the opening statement of the prosecutor, as a reading of the stenographic record of his opening statement makes plain. (See Stenographic Transcript, Bill of Exception Vol. IV, pp. 34-35, 52, 57, 80).

Plainly absurd is the argument (Gov't Br. 20) that, because Goldstein delivered deeds of full title to Bon Air to Johnson in July, 1939 and simultaneously, took back quitclaim deeds for one-half interest to Skidmore (R. 164, 188), there is warranted the inference that Johnson gave Goldstein money to make the purchases at the time of the acquisition of the property in December, 1937. Peacock,

associate of Goldstein (2 MR. 62), first took title as trustee of Bon Air, in December, 1937 upon nomination of Goldstein (R. 188, 194), at the time that the property was purchased, according to Goldstein's testimony (2 MR. 57). About sixteen months later, title was transferred to Johnson with a one-half interest quitclaim back to Skidmore in July, 1939. (R. 163, 188)

The formal transfer to Johnson so long after the purchase tends no more strongly to support the inference that Johnson supplied the purchase money than that it came from Skidmore. Particularly, is this so when regard is had for the fact that Skidmore was Goldstein's client.

The basic frailty of the Government's argument as to corroboration appears in the statement (Br. 20):

> "Johnson's admission that he had a one-half interest * * * made it as likely as not that he had been the one to give Goldstein the money to purchase the properties."

We had not supposed that evidence giving equal support to either of two inconsistant inferences would in this Court be urged as sustaining either. The contrary is too well established. *Gunning* v. *Cooley*, 281 U. S. 90, 91; *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 339.

Neither is there support in the record for the premise that Johnson was the one person, shown by the record, to transact his business in cash. (Gov't Br. 20, 93). Skidmore, as is shown above, (p. 21, n. 13) had large sums of cash available and transacted business with such sums. Even if the premise were true, the conclusion is fallacious. For even if Johnson were the one man shown in the record to have large sums of cash, this would not prove that others outside the record did not have large sums of cash, and cer-

tainly, Goldstein was not confined in the source of large sums of currency to persons embraced by this record.

The only remaining corroboration of Goldstein urged by the Government (Br. 21, 31) is testimony of an Internal Revenue Agent that Johnson admitted ownership of the 9730 Western Avenue property and the Bon Air Country Club. This asserted corroboration falls of its own weight in view of the Government's admission that Goldstein proved Johnson had only a one-half interest in 9730 Western Avenue (Gov't Br. 115). The agent's testimony of the alleged admission by Johnson therefore must either be taken as corroborating a statement that Johnson had only a one-half interest in these properties or as contradicting Goldstein.

The circumstances indicate that Johnson told the truth.— The veracity of Johnson is important on the question of Goldstein's false swearing, because his testimony on the question of whether he supplied Goldstein with the purchase money is the testimony of the only person other than Goldstein who could know the facts.

The Government, in effect, takes the position that Johnson did not tell the truth on the stand, but did not testify falsely on all things. It argues that he should be believed in his testimony that is against his interest and disbelieved when it is in his interest. For example, at the end of the Government's case, there is evidence, if believed, tending to show an excess of expenditures over reported income of $474,349.54 (Gov't Br. 22). When Johnson took the stand, he testified to various additional expenditures not theretofore charged against him by the Government, which totalled some $200,000 and testified to assets at the beginning of the second period, amounting to some $140,000, or some $150,000. (3 MR. 960.)

The Government relies on the testimony as to the $200,000 expenditures and rejects the claim of $140,000 for assets (Gov't Br. 22). The important feature of this testimony is that it is hardly reconcilable with that aversion to the truth which the Government asserts characterized Johnson's testimony whenever the truth might hurt his case.

Even if we exclude from consideration all testimony of Johnson, favorable to him, this would not exclude his testimony denying the giving of purchase money to Goldstein. It was testimony that could only hurt him. Goldstein testified that Johnson gave him all the purchase money for 9730 Western Avenue (2 MR. 56, 65), but on cross examination, he admitted Johnson had given deeds for only a half interest (2 MR. 64-65).

If Johnson were indifferent to the truth and concerned only with his own interest, he could have avoided any conflict with Goldstein's testimony and avoided also any adverse effect from such testimony by admitting the giving to Goldstein of purchase money, and by going on to explain that Skidmore had paid him one-half that amount ~~held~~ before ~~and~~ after the payment to Goldstein.

But Johnson forebore to take this easy mode of explanation because it was contrary to the truth. His natural interest did not lie in the direction of his testimony, but he, nevertheless, elected to state the facts as he knew them. On the other hand, Goldstein was under the strong pressures indicated above to testify that he received the purchase money from Johnson in order to conceal the Skidmore interest. When regard is had for the fact that Johnson voluntarily gave testimony which was necessarily against his own interest, it is apparent that there is present

a strong reason for believing Johnson rather than Goldstein.

The conclusion of the appellate court that the trial court's finding that Goldstein did not swear falsely, was without support in reasoning or logic, is amply sustained by the evidence. That he did swear falsely, is also convincingly demonstrated by the evidence.

Aside from this, however, it is clear from the argument of the Government itself (Br. 84-90) that Goldstein by his testimony sought either skillfully to misguide the jury or to commit nonprovable perjury, one or the other. The Government does not attempt to refute this proposition.

One who is capable of thus willfully misguiding a jury so as to imperil the liberty of others, can have no great compunction about false swearing. The blurred line is easily obscured entirely. Ordinary justice, of course, would require a new trial regardless of whether Goldstein was guilty of false swearing or of bad faith in such crucial testimony, but here, as the circuit court of appeals held, the affidavits of Goldstein afforded "no substantial support for a finding that he testified truthfully at the trial" (AR. 225); and the proof "unerringly points to the fact that Goldstein's trial testimony was false" (AR. 227).

2. **Without the testimony of Goldstein, the jury might have reached a different conclusion.**—There can be no serious question that the second requirement of the *Larrison* case is satisfied.

Questions of Guilt on Original Trial Was Narrowly Balanced.—From the beginning the question of the guilt of Johnson and the other defendants has been a matter of

serious doubt. For the very grand jury, impaneled for the December 1939 Term, that returned the indictment in the instant case against Johnson and the other respondents, charging Johnson with ownership of gambling houses and with having received all the income therefrom, did at the same term also return separate indictments against the defendants Sommers, Hartigan, and Keliy charging, not that Johnson, but that they individually received the entire income from the gambling houses managed by them as their own.[42]

On the trial more than twelve hours were required by the jury to reach a verdict. On appeal, the circuit court of appeals held that the verdict could not be supported on the ownership theory: that Johnson was the owner of a full or part interest in the gambling houses (123 F. 2d 111, 124). In this Court, argument was had April 10-13, 1942. On May 4 following, this Court on its own motion ordered reargument directed solely to question as to the sufficiency of the evidence.[43]

Reargument was held October 12, 1942. Almost eight months elapsed before this Court on June 7, 1943 an-

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[42] Copies of these indictments have been lodged with the clerk.

[43] The journal for May 4, 1942 contains the order of this Court directing:

"For purposes of the reargument, the briefs with appropriate record citations and arguments of counsel will be directed solely to the following questions:

"(1) What evidence warranted submission by the trial court to the jury of the charges made as to each of the defendants (a) in each of the four substantive counts, and (b) in the conspiracy count?

"(2) In the circumstances of this cause, is proof of gross receipts sufficient to establish that net income resulted from the operation of any enterprise in which respondent Johnson is alleged to have been interested?

"(3) To sustain the sentence of respondent Johnson on the first four counts, on petitioner's 'expenditure theory', must the record furnish proof that during some one of the four years referred to in those counts his expenditures exceeded reported income, and were made in part from his unreported income received in that particular year?

"(4) If so, does the record furnish such proof?"

nounced its decision holding the evidence sufficient and reversing the circuit court of appeals (Mr. Justice Roberts dissenting). 319 U. S. 504.

Aside from this record indicating the delicately poised nature of the evidence,[44] it is pertinent to note the further action of the United States Attorney in the individual indictments against Sommers, Hartigan, and Kelly mentioned above. While the instant case was still pending in this Court, the United States Attorney in the cases in which these defendants had been independently indicted filed bills of particulars alleging that they are the real owners of the gambling houses and that they received as their personal income the very same income with which in this case Johnson is charged.[45]

The question whether Goldstein's testimony was prejudicial is not open here.—The Circuit Court of Appeals held (A. R. 209): "That Goldstein's testimony was material and, if false, was highly prejudicial to the defendants, is not in dispute." The Court held (A. R. 228): "We think we need not labor the point that the jury might have reached a different conclusion without it. In fact, it was upon his testimony that the Government placed much reliance, that Johnson was the owner of certain properties, by reason of which he was charged with all of the purchase price as well as with the enormous expenditure made thereon."

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[44] If on the original trial Goldstein had not testified falsely, it is clear that some jurymen might think (as Mr. Justice Roberts and as Judges Sparks and Major apparently thought from the language of their opinions, 319 U. S. 503, 520; 123 F. 2d 111, 124) the so-called ownership (of gambling houses) evidence too speculative to be a basis for conviction. The jury would certainly have been charged that as against the co-defendants the expenditure evidence standing alone did not even tend to prove a case, and as against the defendant Johnson they would have been charged that the expenditure evidence was legally insufficient and in any event probably would have found it insufficient to eliminate all doubt of guilt.

[45] Certified photostatic copies of these bills of particulars have been lodged with the Clerk.

The Government neither assigns nor specifies error with respect to these rulings. Furthermore, points not raised but waived below will not be considered here. *Helvering* v. *Wood*, 309 U. S. 344, 349; *Kay* vs. *U. S.* 303 U. S. 1, 5.

It is therefore submitted that the question of the materiality of Goldstein's testimony is not open here. If a mere reference in a petition for certiorari to a ruling without a request for review will not cause its consideration (*Connecticut Ry. Co.* v. *Palmer*, 305 U. S. 493, 497) a fortiori that ruling will not be considered when it is not even mentioned.

But the Government, while not specifying the ruling of the Court as error or setting its contention out as a point in its brief, nevertheless, argues extensively that Goldstein's testimony was immaterial because it bore but little on the ownership theory and the evidence under that theory alone was sufficient to support the convictions, (Br. 10-12, 113). It also argues that the great bulk of the newly discovered evidence was designed to prove that Skidmore had an interest in Bon Air, whereas the crucial issue was whether Johnson, in fact, made the expenditures thereon (Br. 23, 29) and that the record contains evidence on this latter issue other than that of Goldstein (Br. 88, 115). It also argues that even under the respondent's own computation, there was an excess of expenditures over reported income of $42,000. We proceed to show that none of these contentions are tenable.

Goldstein's testimony was used not on the expenditure theory alone, but was of great importance under the ownership theory as well.—The Government's contention here constitutes a clear reversal of the position taken by it in the original argument in this Court (Gov't Br. 797, 800, O. T. 1941, page 51):

"Moreover, the court erred in assuming that the so-called 'ownership' and 'expenditure' theories were wholly independent of each other. They were not. Each gave support to the other. The showing that Johnson had expended large amounts of money in excess of his stated resources fortified the conclusion that he was the owner of the gambling houses with which he had been identified. And the evidence of his participation in the affairs of the gambling houses made reasonable the conclusion that his large expenditures were made from income that was derived from his ownership of the gambling enterprises."

The same position was taken by the Government on the reargument (Gov't Br. in Nos. 4 and 5, O. T. 1942, p. 5):

"The 'ownership' and the 'expenditure' theories are thus not separate and distinct branches of this case. It is erroneous, we submit, to attempt to isolate each theory, and to search the record for support of each. The correct approach is to consider them together, since each offers substantial support for the other."

On the original motion for a new trial, Judge Barnes stated (R. 465):

"Since the trial, the parties, from time to time, have referred to two theories of guilt—'the ownership of gambling house' theory and the 'expenditures' theory. But, to separate the evidence touching these two theories and to view the case as presenting only evidence pertinent to one or the other is to assume an artificial viewpoint and one that the jury did not have."

This Court treated the two theories as being interrelated, holding 319 U. S. 503, 517:

"That he [Johnson] had large, unreported income, was reinforced by proof which warranted the jury in finding that certainly for the years 1937, 1938 and 1939, the expenditures of Johnson exceeded his available declared resources."

Goldstein's testimony was relied upon as a material element of the proof under the ownership theory.—The contention that Goldstein's testimony was not important under the "ownership" theory, is not consistent with the importance placed thereon in the Government's brief or reargument in this court, Nos. 4 and 5, O. T. 1942, developing the so-called ownership theory.

In that brief under the heading "The Operation of the Gambling Houses as a Unit" (p. 9), the Government stated (pp. 27, 29-30):

> "From June 1936 to July 1938 banking transactions of the Horseshoe, Lincoln Tavern, D & D Club and Harlem Stables were handled at a single currency exchange, the Albany Park Currency Exchange, through a single account. * * * [Gov't Br. on Rearg., p. 27.]
>
> "In July 1938 all of this business was taken away from the Albany Park Currency Exchange (2 R. 477-478). * * * Brown opened the Lawrence Avenue Currency Exchange [in the Albany Park Bank Building] near the Albany Park Exchange in July 1938 (2 R. 478, 532). Sommers, Hartigan and Kelly stated to revenue agents that they cashed checks at the Lawrence Avenue Exchange (2 R. 459, 463, 468). The Lawrence Avenue Exchange carried all of this business as a single account. * * *" [Gov't Br. on Rearg., pp. 29-30].

In the same brief on reargument at page 30 and under the heading "The Ownership of Johnson" the Government stated:

> "Johnson was shown to be the owner of the building in which Brown's currency exchange, the Lawrence Avenue Currency Exchange, was located (2 R. 56-57). [The record reference is to Goldstein's testimony as to the purchase of the Albany Park Bank Building.] This latter building was purchased by Johnson on July 16, 1937 (2 R. 57). [This record

reference again is to Goldstein's testimony as to the purchase of the Albany Park Bank Building.]"

Goldstein's testimony as to the Bon Air purchase was highly material with respect to the propriety of charging all expenditures thereon to Johnson—The argument that the question of whether Skidmore owned a half-interest in the Bon Air is unimportant (Gov't Br. 23, 114) ignores the fact that the question of who should properly be charged with having made the $548,000 expenditures thereon in 1938 and 1939 turns in large part upon who was the owner of the property, *i. e.*, upon whether the purchase money was all Johnson's as might be inferred from Goldstein's testimony that Johnson supplied the currency and was given a quit claim deed to the property (2 MR. 58).

The Government argues that Johnson admitted to revenue agents and stated to accountants that he alone had paid for the Bon Air properties and improvements thereon (Br. 115). It cites to its statement of facts (Br. 30-31) but reference to the matter there cited will disclose that the statement to the accountant (2 MR. 53-54) was merely a direction to remove original construction and equipment cost figures for 1938 from the books of the Catering Company since they were not assets of the corporation, and that the accountant testified merely: "They were assets, I presume, of Mr. Johnson."[46]

The Government refers to the testimony of revenue agents (Br. 31) that Johnson admitted ownership of the

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[46] The Government also relies (Br. 31) on the fact that no partnership returns were filed by Johnson and Skidmore although Johnson said he and Skidmore were partners in ownership of Bon Air and Western Avenue (3 MR. 983). No partnership returns were required because Johnson and Skidmore were merely joint owners of the property and not conducting a business. There is no suggestion that they jointly operated a business at 9730 Western Avenue. Bon Air operations were conducted by the Bon Air Catering Company, Inc. (Gov't. Br. 30). The legal distinction between a partnership in the legal sense of a business and the mere co-ownership of property to which Johnson referred is elementary. Crane, Partnership (Hornbook Series) sec. 12, p. 39.

Bon Air property. This alleged admission went equally as the Government's record citations in support ("2 R. 117-118; 4 R. 8" (Br. 31)) show) to both the Bon Air and 9730 Western Avenue properties. Since the Government concedes that Johnson had only a one-half interest in 9730 Western Avenue (Br. 14, 25, 115) the same statement that Johnson made to the agents with respect to 9730 Western Avenue cannot be taken as proof of sole ownership in one case and of one-half ownership in the other. If the alleged admissions cannot be reconciled with conceded facts they must be rejected. If they can be reconciled, then they go only to corroborate Johnson's trial testimony and defendant's motion evidence.

Furthermore, the Government's argument that the verdict could possibly be sustained in the absence of Goldstein's testimony mistakes the question. It overlooks the fact that as held in the *Larrison* case, to determine whether the false swearing was prejudicial, the question is whether Goldstein's testimony *might* have influenced the jury in reaching its verdict. That the jury might well have relied upon the expenditure theory rather than the ownership theory is evidenced by the fact that two members of the Circuit Court of Appeals on review of the case on the merits felt that the testimony going to expenditures was the only testimony that had any persuasive weight, and that the testimony going to ownership was too speculative. *United States* v. *Johnson*, 123 F. 2d 111, 124. And Mr. Justice Roberts dissented on the ground, *inter alia*, there was no evidence whatever to prove that the co-defendants aided or abetted Johnson. Since the ownership theory required acceptance of the co-defendants as aiders and abettors of Johnson, this shows that Mr. Justice Roberts thought only the expenditure theory to be tenable on the evidence.

Under the falsus in unus charge, the Goldstein testimony contradicting Johnson was plainly prejudicial.—Without stopping now to detail the inaccuracies in the Government's computation, (See fn. 10, p. 11, *supra*) it is sufficient to note that the invalidity of this contention as to immateriality of the false testimony is apparent from the fact that Johnson directly, categorically, and completely denied the truth of Goldstein's testimony with respect to all of the properties involved about which there is any controversy (3 MR. 955-957). But for Goldstein's testimony, therefore, the jury would not have been authorized, as it was, under the charge of the trial court, to disregard all of the defendant Johnson's testimony. The trial court instructed the jury that it was at liberty to disregard all the testimony of any witness if it believed any of his testimony to be false (3 MR. 1006). In view of the clear conflict either Johnson or Goldstein lied. The jury could not believe Goldstein without believing Johnson's testimony to be at least in part false. Therefore, believing Goldstein, the jury was at liberty under the charge to reject all of the defendant Johnson's testimony. The prejudicial effect of this fact cannot be gainsaid in view of this Court's statement in its opinion (319 U. S. 503, 516):

> "* * * During the course of his extensive testimony, Johnson himself put simply and completely the only real problem before the jury when he swore that he 'never had any financial interest in any gambling club operated by any of the defendants.'
>
> "The jury decided this central issue against Johnson."

If the jury had believed Johnson, and it cannot be denied that they *might* have done so in the absence of the conflict of Goldstein's testimony, they would clearly have reached a different result. That false testimony presenting a square

contradiction of a defendant's testimony; in a case in which the "*Falsus in unus, falsus in omnibus*" charge is given, is prejudicial to the extent of requiring a new trial is well established. *Pettine* v. *New Mexico*, 201 Fed. 489, 493 (C. C. A. 8); *State* v. *Mounkes*, 91 Kan. 653, 138 Pac. 410, 411, cited with approval in *Martin* v. *United States*, 17 F. 2d 973, 976 (C. C. A. 5).

False testimony, like any other error in the admission of evidence, will be deemed prejudicial unless its harmless character is affirmatively demonstrated. *Vicksburg & Meridian Railroad Co.* v. *O'Brien*, 119 U. S. 99, 103; *McCandless* v. *United States*, 298 U. S. 342, 347; *Pettine* v. *United States*, 201 Fed. 489, 493 (C. C. A. 8); *Dressler* v. *United States*, 112 F. 2d 972, 978 (C. C. A. 7). Plainly, a defendant is not to be deprived of his constitutional right to a fair trial on the ground that the trial court thinks acquittal not probable on retrial. *Tumey* v. *Ohio*, 273 U. S. 510, 535.

Applicable here to the Government's attempt to now minimize the effect of Goldstein's testimony is the statement of Mr. Justice Van Devanter in *Miller* v. *Oklahoma*, 149 Fed. 330, 339 (C. C. A. 8):

> "The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempt them to an insistence upon the admission of incompetent evidence * * * When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the

liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

3. The diligence of the respondents is clear.—The circuit court of appeals held after extended consideration, that respondents have not been guilty of any delay so unreasonable as to preclude consideration of their evidence on the ground of lack of diligence (AR. 229-230). The Government does not argue the question, contenting itself with the statement (Br. 117): "The record should speak for itself in that connection."[47]

It is therefore submitted that under the properly applicable rule of law enunciated in the *Larrison* case, the facts proved amply justified the new trial ordered by the circuit court of appeals.

4. The government's contention that the rule of the Larrison case has no application is merely an indirect form of contention that the evidence of false swearing was inadequate.—The Government does not seriously question that the rule of *Larrison* v. *United States*, 24 F. 2d 82, 87 (C. C. A. 7) is the rule appropriate to test the adequacy of evidence in support of a motion based on evidence of false swearing (Govt. Br. 79-83). It asserts (Point II, Br. 79) that the *Larrison* case rule is properly applied in cases of recantation (Gov't Br. 81). But the Government in the court below recognized that formal recantation, because it is only a sworn statement of a self-confessed perjurer, is the most unreliable of all testimony to prove perjury. *Harrison v. United States*, 7 F. 2d 259; *Dale* v. *United States*,

[47] We are also content to submit this issue on the record. See affidavit of Johnson (R. 233 et seq).

66 F. 2d 666; *People* v. *Shiletano*, 218 N. Y. 161. The Government asserts (Br. 82):

> "the majority below have extended that [*Larrison*] rule to a case where there has been no recantation, but, on the contrary, vigorous reassertion of the witness's trial testimony."

It then concedes (Br. 65):

> "We should have no quarrel with an extension of that [*Larrison*] rule to a case where there has been a clear and convincing showing of perjury found by the trial court."

The Government thus concedes that if Goldstein's testimony was false, the *Larrison* rule applies and the only additional elements required to be shown are diligence and that *without* such evidence the jury *might* have reached a different result.

The Government thus complains, not that the appellate court in invoking the rule of the *Larrison* case, applied an improper rule of law or improper criteria, but that the evidence was insufficient to satisfy one of the propositions required by that rule to be established—the falsity of the witness's testimony, and since the rule authorizes new trial only when all three propositions of fact are established, the rule cannot operate to require grant of new trial in this case. But the Government assumes as a premise that the evidence was insufficient to show falsity and concludes therefrom that the *Larrison* case has no application. The construction under Point II thus amounts to no more than a renewed assertion that the evidence was insufficient to show falsity. As shown above, however, the evidence is more than adequate to reasonably satisfy that Goldstein was guilty of false swearing at the trial within the first requirement of the *Larrison* case. The

Government's conclusion that the *Larrison* case has no application obviously falls with the factual premise upon which it is based.

B. THE MOTION EVIDENCE CLEARLY DEMONSTRATED THE RIGHT OF DEFENDANTS TO A NEW TRIAL BECAUSE IT IS SO MATERIAL THAT IT WOULD PROBABLY PRODUCE A DIFFERENT VERDICT IF THE NEW TRIAL WERE GRANTED.

Ignoring the fact that defendants' evidence is more than adequate reasonably to satisfy that Goldstein swore falsely at the trial and so requires a new trial under the rule of the *Larrison* case, it is submitted that the evidence considered on the essentially different issue of Johnson's guilt or innocense also requires a new trial under the rule of the *Berry* case.

1. *The evidence in support of the motion demonstrates that Johnson never made any expenditures not reconcilable with his reported income.*—Only by charging that Johnson was the sole owner rather than half owner of the Bon Air Country Club and its adjacent properties, the Green House, the White House, Curran Farm and Gas Station, and of the 9730 Western Avenue property and that he was the sole owner of the $7500 and $10,000 escrows and the Albany Park Bank Building could the Government argue that its evidence showed Johnson's expenditures to be irreconcilable with his reported income.

The Government (Br. 22-23) makes a flat misstatement of the trial record in endeavoring to show that defendants' computations on their own evidence admitted that Johnson spent some $240,000 more than could be reconciled with his tax returns during the period January 1, 1932 through December 31, 1939. The Government states that defendants' expert witness, Sullivan, submitted a computation not taking into account additional expenditures or assets ad-

mitted by Johnson which left a total excess of some $42,000 citing "3 MR. 992." Reference to Sullivan's testimony appearing on that page shows that he totaled Johnson's *expenditures* as being some $432,000 less than the Government's figures. This amount was the result, not of a comparison of Sullivan's and Clifford's computations of the difference between expenditures and income as asserted by the Government, but of a comparison of their computations of expenditures only. The Government wrongly asserts on the basis of this misstatement of the record that "this figure which did not take into account the additional expenditures or assets admitted by Johnson, left a total excess of some $42,000. Thus with the additional expenditures or assets admitted by Johnson, there was an excess of some $240,000 even according to respondents' computations." Defendants' expert witness, Sullivan, testified categorically (3 MR. 994) that including all additional expenditures and assets testified to by Johnson, Johnson's assets and reported income totaled more than his expenditures by $68,860.84. Defendants' expert therefore cannot by any stretch of the imagination be taken to have computed on the record evidence that Johnson's expenditures exceeded his income and assets by $42,000, or $240,000, or any other amount.

It is clear that with the necessary adjustments indicated in the tabulation appearing on page 11, applied to the Government's expenditure chart (Gov't Br. App'x B) there were no expenditures by Johnson in excess of his reported income.[48]

[48] The Government contends throughout its brief, and the trial court held, that proof of Skidmore's ownership interest in the various properties was not inconsistent with Goldstein's testimony. It should be noted that for the purpose only of showing that Johnson's expenditures should not be computed on the assumption of sole ownership we rely on the motion evidence of Skidmore's ownership only as proving that Johnson was not the sole owner of the properties and that expenditures attributed to him on that basis must therefore be adjusted to accord with the actual extent of his ownership. For this immediate purpose it is not necessary to consider whether or not the evidence also tends to prove Goldstein testified falsely.

The Government does not dispute the convincing nature of the affidavits and documentary evidence directed to showing that Johnson was not the owner of the Albany Park Bank Building or the escrow deposits or of more than a one-half interest in the other properties. It contends that aside from the affidavits showing direct admissions of false swearing and acts or statements inconsistent with Goldstein's testimony at the trial, all the rest of the motion evidence relating to the Bon Air properties "*has a bearing only*" on the question of ultimate ownership of the properties, an issue at the trial. From this it concludes that all such evidence was merely cumulative and under the *Berry* case the motion was therefore properly denied (Br. 107).[49] The Government also contends under Point IV that under the *Berry* rule the evidence was not such as would probably produce acquittals on a new trial. In support it argues merely that the trial picture as to the credibility of Goldstein's testimony would not be changed by the motion evidence (Br. 111). However, it is obvious that the newly discovered evidence of half ownership of Skidmore in the first group of properties and the evidence of statements and acts of Goldstein inconsistent with his testimony at the trial as to Johnson's supplying him currency for the two escrow deposits and the Albany Park Bank Building and as to delivery of a deed for the latter is so overwhelming that the testimony of Goldstein that the purchase money was given to him by Johnson would pale into insignificance on the ultimate question whether all the purchase moneys for the first group of properties and all the expenditures on Bon Air, and all of the escrow

[49] The Government plainly shares the error of the trial court in its narrow and erroneous view that the evidence as to acts of ownership "*has a bearing only*" on the question of ultimate ownership of the properties and in its failure to appreciate that the evidence as to ownership of the properties was, as pointed out above, pp. 15-17, 18, also highly pertinent to show motive of Goldstein and corroboration of the contradictory affidavits of Johnson all on the issue of false swearing.

deposits and purchase money for the Albany Park Bank Building were money chargeable as personal expenditures to Johnson.

2. The Government's charge that Johnson was the owner of the gambling houses operated by the co-defendants has been abandoned and the government now admits the co-defendants, not Johnson, were the owners of such houses.—In the opinion of this court, reversing the decision of the circuit court of appeals (*United States* v. *Johnson*, 319 U. S. 503), critical importance is attached to the question whether Johnson owned the gambling houses operated by the co-defendants. This court there said (p. 516):

> "During the course of his extensive testimony, Johnson himself put simply and completely the only real problem before the jury when he swore that he 'never had any financial interest in any gambling club operated by any of the defendants.'
>
> "The jury decided this central issue against Johnson * * *. The testimony also amply justified the conclusion that Johnson owned a proprietary interest in this network of gambling houses * * *."

While the case was pending on the merits in this court, the government apparently concluded that the "central issue" as to the ownership of the gambling houses from which Johnson's unreported income was supposed to have originated must be resolved in favor of Johnson for it openly and publicly admitted by inconsistent pleadings in other criminal proceedings that persons other than Johnson were the owners of the identical gambling enterprises in which he had been by it urged to have a proprietary interest and had themselves received the income from these houses with which Johnson was charged in this case. On March 19, 1940, the defendants Sommers, in Indictment

No. 32154, Hartigan in Indictment No. 32155, and Kelly in Indictment No. 32156, had been indicted in the United States District Court for the Northern District of Illinois, Eastern Division, for attempting to defeat and evade income taxes. Hartigan was accused on two counts. The first count charged that in 1937 he derived income from gambling in the amount of $119,824.30 and reported income in the amount of only $13,628.00. The second count charged that in 1938 he derived income from business in the amount of $101,456.08 and reported as income from business only $11,500.00 and from dividends $20.00. The indictment against Kelly in the first count charged that in 1936 he failed to report income from gambling in the amount of $81,847.36. The second count charged that in the year 1937 he failed to report income from gambling in the amount of $212,645.45. The third count charged that in the year 1938 he failed to report income from gambling amounting to $99,335.51. The indictment against Sommers was in three counts. The first charged that during the calendar year 1936 he derived income from gambling in the amount of $433,615.02 and reported his income, as a "speculator" as only $11,000.00. In the second count he was charged with having failed to report income for 1937 from gambling business in the amount of $428,951.51. The third count charged that in the year 1938 he derived income as a speculator in the amount of $8,200.00 and from gambling in the amount of $530,125.25, a total of $538,325.25, of which he reported only $9,218.29. Stuart Solomon Brown was accused as an aidor and abettor at each count in each indictment.

In this Court the Government charged that for 1936 Johnson's income amounted to $485,294.57 (Br. on Rearg., Nos. 4 and 5, 1942 Term, p. 52). This was based upon the testimony of Frank J. Clifford at the trial that the total

sum of $533,216.94 was chargeable to Johnson.[50] He said (3 MR. 751):

> "In making the calculation I assumed that Mr. Johnson owned all of the gambling houses that have been named in this testimony and that all the checks cashed by any of these defendants were checks representing income of Mr. Johnson and that all the currency exchanged by any defendants represented income of Mr. Johnson."

For 1937 the United States charged Johnson with total income from gambling houses of $852,890.56 (Gov't Br. on Rearg., p. 52). With an adjustment of $203,954.03 on account of checks cashed by Creighton, this figure is derived from a total amount of $1,056,844.59 charged to Johnson by Special Agent Clifford who testified (3 MR. 752) that in making this calculation "all of the cash exchanged by any of these defendants was income of Mr. Johnson and all of the hundred dollar bills that were delivered out of a bank down to the Lawndale Currency Exchange, I counted that as Mr. Johnson's."

For 1938 the United States charged Johnson with the total income of gambling houses in the amount of $850,994.20 (Gov't Br. on Rearg., Nos. 4 and 5, 1942 Term, p. 53). This was derived from a figure of $939,807.12 computed by Agent Clifford (3 MR. 753) and takes into account an adjustment to eliminate amounts identified with the acquitted defendant Creighton (Gov't Br. on Rearg., Nos. 4 and 5, 1942 Term, p. 52, note 11). Clifford testified (3 MR. 753) that for this year his computation was based on the assumption that "anything that belonged to the gamblers belonged to William R. Johnson and that is included in

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[50] The $533,216.94 figure was by the Government on the argument in this Court adjusted to eliminate the amount of checks cashed by the acquitted defendant Creighton so as to arrive at the figure of $485,294.57.

my computation. That is all for 1938. That makes a grand total of $939,807.12."

For 1939 the Government charged Johnson with $926,499.30, eliminating $40,000 from the Clifford figure (3 MR. 754) on account of the checks cashed by Creighton. He testified that this included $886,499.30 of the balance of the "gamblers' checks that went through the Lawrence Avenue" Exhange.

Bills of particulars in indictments against co-defendants.—In December 1942, while this case was pending on the merits after reargument and before decision, in this Court, the United States filed bills of particulars in amplification of these indictments in which it was stated specifically that the source of the income of defendant Kelly during the calendar years 1936, 1937 and 1938 was the D. & D. Club and of the defendant Sommers during the calendar years 1936, 1937, and 1938, was the Horse-Shoe Club and the Dev-Lin, and of the defendant Hartigan during the calendar years 1937 and 1938, was the Harlem Stables and the Lincoln Tavern. The Government, in this court, in its brief on reargument, had specifically named these same gambling houses and contended that the evidence showed Johnson to be the single owner of the same gambling houses (Govt. Br. on reargument Nos. 4 and 5 O. T. 1942, pp. 18-30). At no time in the proceedings has there been denial of the allegation contained in the appendix to defendant's motion for new trial, and incorporated therein by reference (R. 13, 65-66), that the United States attorney in bills of particular in the cases against the co-defendants specified that they and not Johnson received and were liable for taxes upon the same income which, in the Johnson case, the Government contended Johnson had received.

Submission of this additional evidence to any jury would obviously have a great, if not decisive, tendency to con-

vince that Johnson did not and could not have received from the gambling houses of the co-defendants, any income whatsoever. The filing of indictments against two or more persons, charging the same violations of law, may not ordinarily be deemed prejudicially contradictory. The situation here presented is radically different. Throughout the trial in the district court, the appeal in the circuit court of appeals, the argument and briefing in this court on the original argument and on the re-argument, the government in this case contended, over a period of almost three years that Johnson had been shown to be the single owner of these gambling enterprises. Nevertheless, and while the case was pending in this court, the district attorney, with the full knowledge developed by the trial and notwithstanding the contention pressed upon this court, filed a bill of particulars asserting that the co-defendants were the owners. A position thus adopted after full knowledge of the facts developed by an obviously carefully prepared case, cannot be ignored as a mere precautionary measure. Such allegations must be treated as an admission by the United States that Johnson was not the owner of the gambling houses.

3. Johnson's testimony at the trial as to his personal expenditures is proved to be true by the evidence submitted on the motion which thus constitutes important corroboration and support for all of his testimony which, if believed, would require a verdict of acquittal.—The evidence brought forward on the motion clearly establishes that Skidmore was a half-owner with Johnson of the Bon Air and Associated Properties, 9730 Western Avenue and The Dells; and that Johnson had no interest in the Albany Park Bank Building or in the $10,000 and $7,500 escrow deposits (see supra, pp. 34-76 and Appendix). Plainly this evidence furnishes important corroboration for his testimony at the trial

that he had only a half-interest in the first group of properties and no interest in the Albany Park Bank Building or the escrow deposits (3 MR. 955, 957). By the same token, the corroboration afforded by this confirming evidence extends to all of his testimony. If believed, his testimony would require a verdict of acquittal since it demonstrates not only that his expenditures were less than his assets at the commencement of the accounting period plus his reported income, as is shown in the table contained in footnote 10 *supra*, page 11, but as well included a specific denial of ownership of the gambling houses (3 MR. 949-950).

III.

THE TRIAL COURT'S DENIAL OF THE AMENDED MOTION FOR NEW TRIAL CONSTITUTED AN ABUSE OF DISCRETION.

The trial court erroneously failed and refused to apply the doctrine of the *Larrison* case to the evidence and in purporting to apply the doctrine of the *Berry* case committed reversible error.

A. THE TRIAL COURT MISCONCEIVED THE PURPOSE AND EFFECT OF THE MOTION TESTIMONY ON THE ISSUE OF GOLDSTEIN'S FALSITY AND POSED IMPROPER AND INAPPLICABLE CRITERIA AS THE TEST FOR FALSITY.

The trial court disregarded completely the theory of defendants' proof that Goldstein testified falsely at the trial. He gave no consideration whatsoever to proof that Goldstein is an unreliable witness. He gave no consideration to evidence corroborating Johnson, thus strengthening Johnson's categorical charge that Goldstein had testified falsely. He completely ignored proof that Goldstein had compelling motive for giving false testimony. His opinion indicates basic misconception of defendant's pur-

pose in tendering the motion evidence and an insistance upon inapplicable criteria as the only method of proof that Goldstein testified falsely.

1. The trial court took the position that proof of Skidmore's acquisition of the various properties and of his ownership in them could only be relevant on the issue of falsity if Goldstein had testified in so many words that Johnson was the sole owner of such properties.—The trial court (R. 463-464) wrongly conceived defendants' argument as boiling down to the following syllogism:

> Goldstein testified that Johnson was the "sole owner" of all of the properties involved.

but

> The evidence in support of the motion demonstrates that Johnson was not the sole owner of these properties.

therefore

> Goldstein's testimony is proven false.

This assumption by the court and by the United States (Br. 84) is without foundation. The defendants have never suggested that Goldstein testified in so many words that Johnson was the sole owner of all the properties involved. Defendants have contended and the Government admits that the inference from Goldstein's testimony was that Johnson did have 100% ownership in these properties (Br. 115). Defendants necessarily, in order to prove that Goldstein's testimony was material and to show that "without it the jury *might* have reached a different result" discussed the meaning as well as the actual words used by Goldstein. As has been pointed out above, proof that Skidmore had substantial ownership interest in these properties established a motive for Goldstein's false testimony of such powerful character that the Government concedes he once

before committed perjury to effectuate it. It was obvious error for the trial court to ignore the relevancy of this evidence on this point and to consider it as being offered on the mistaken assumption by the defendants that Goldstein had used the words "Johnson was the sole owner" in his testimony.

2. The District Court's criteria for the proof of falsity of Goldstein's testimony are improper:—The trial court implies that such proof should have been made either by a formal affidavit of recantation by Goldstein or by affidavits from persons having personal knowledge stating that Johnson did not give Goldstein the money to buy the properties. The first method is the *worst*, and the second in the circumstances of this case an *impossible* method of proof of false testimony.

The trial court's emphasis on the fact that Goldstein had not formally recanted indicates a disregard of the decisions of the court below and other courts which have held time and time again that a formal affidavit of recantation by a self-confessed perjurer is the most unreliable of all methods of proving the falsity of his testimony for the purpose of a new trial. *Dale* v. *United States*, 66 F. 2nd 666; *Harrison* v. *United States*, 7 F. 2d 259; *People* v. *Shiletano*, 218 N. Y. 161; *Powell* v. *Commonwealth*, 133 Va. 741. This erroneous action parallels his rejection of admissions by Goldstein that he testified falsely (R. 100, 126, 221, 233), made under circumstances which preclude any possibility of collusion for the purpose of obtaining a new trial, as "merely impeaching."

The court's reiteration, in connection with the discussion of each item of property concerning which Goldstein testified falsely, that defendants have submitted no affidavit of

a third party in which it is stated that "Johnson did not give Goldstein the money" (R. 476, 483, 485, 490, 491, 492), to purchase said piece of property shows either a complete lack of understanding of the facts of the case or an insistence upon an inherent impossibility as a prerequisite to the granting of relief to defendants. On Goldstein's own testimony it is apparent that only Johnson and himself could testify of their own knowledge as to whether Johnson had given him the money to purchase the various pieces of property. Johnson denied it. Whether Goldstein's testimony is assumed to be true or is assumed to be false, no one else could have had personal knowledge concerning the matter.

The trial court disregarded the fact that a conviction for the crime of giving false testimony may be had on circumstantial evidence showing merely the improbability of the testimony claimed to be false (*Schonfeld* v. *United States*, 277 Fed. 934) and that the testimony of one witness which is corroborated is sufficient to obtain a conviction for perjury (*Weiler* v. *United States*, 323 U. S. 606; *United States* v. *Palese*, 133 F. 2d 600 (C. C. A. 3); *Holy* v. *United States*, 278 Fed. 521 (C. C. A. 7)). The testimony in support of the motion for new trial is clearly sufficient as a matter of law to demonstrate the falsity of Goldstein's testimony. As the circuit court of appeals pointed out in the *Larrison* case, proof for the purpose of a motion for new trial need only be sufficient to "reasonably satisfy" the court of the falsity of the testimony of a material witness. *Obviously, none of the procedural or evidentiary safeguards upon which Goldstein might insist if he were on trial charged with the crime of perjury, are available for use by the Government against the defendants facing imprisonment* because of Goldstein's false testimony. On the contrary, it is the

defendants, facing imprisonment, who are entitled to the benefit of any doubt—not the Government or Goldstein *who is not on trial*. This Court is not called upon nor was the court below, nor was the trial court called upon to impose criminal sanctions on Goldstein for his false testimony.

B. THE TRIAL COURT ERRONEOUSLY REJECTED THE EVIDENCE AS CUMULATIVE AND ERRONEOUSLY IGNORED ADMISSIONS BY THE GOVERNMENT THAT JOHNSON IS NOT THE OWNER OF THE GAMBLING HOUSES.

The trial court, defining evidence tending to prove an issue concerning which testimony was adduced at the trial as cumulative evidence, and erroneously confusing the distinction between evidence which, under this definition, may be "cumulative" and evidence which is "merely" cumulative rejected important relevant and admissible evidence of the defendants proffered on the motion for new trial. The trial court also completely ignored admissions by the Government that the mainstay of their case against defendants, namely, the proposition that Johnson was the real owner and had received all of the income from the gambling houses operated by the co-defendants, has since the trial been formally abandoned and repudiated by the Government.

1. The trial court erroneously assumed that evidence which tends to prove an issue on which testimony was given at the trial must be rejected on a motion for new trial as cumulative, neglecting the established rule that such evidence may only be held insufficient if it is "merely" cumulative.—The holding of the trial court that the motion was properly to be denied under the *Berry* case doctrine, insofar as that contention is based on the ground that the

motion evidence is merely cumulative or merely impeaching, arises from a basic misconception as to the meaning of the *Berry* case rule. The Government contends that "cumulative evidence is not ground for a new trial" (Br. 108). The error lies in assuming that the statement in the *Berry* case rule that the evidence must not be "*merely* cumulative" and not "*merely* impeaching" as a matter of law makes inadequate to justify a new trial any evidence, regardless of its quality or quantity, of which it can be said that it is also cumulative or also impeaching.

The true rule of the *Berry* case, of course, is that admissible evidence diligently discovered which would probably cause a different result on new trial and is consequently more than *merely* cumulative or *merely* impeaching (although it may, incidentally, be cumulative or incidentally impeaching) requires the granting of a new trial. It seems clear that the provisions of the third and sixth precepts of the *Berry* case rule that the evidence be not "cumulative only" or "only * * * to impeach" merely exemplify and emphasize the distinguishing requirement in the fourth precept of the same rule that the evidence be so material that it would "probably produce a different verdict, if the new trial were granted." The third and sixth elements are merely statements in negative form of necessary corollaries of requirement 4. Plainly they do not mean that evidence, no matter how material and no matter how strongly it impels to the belief that it would cause a different result on a new trial, is nevertheless insufficient if it also happens to be cumulative or impeaching in character. Indeed the Government concedes that impeaching evidence may constitute a ground for new trial (Br. 110-111). The fallaciousness of the *Berry* case rule as invoked by the trial court and relied upon by the Government, whether invoked to bar new trial

because the new evidence is impeaching or because it is cumulative, is equally apparent. The mere fact that the alleged newly discovered evidence tends to prove the same facts as did testimony which was admitted at the trial does not require a conclusion that because cumulative it is insufficient to constitute ground for a new trial. On this point the court below cited with approval *People* v. *Royals*, 356 Ill. 626, 639:

> "The rule * * * does not bar the granting of a new trial on the ground of newly discovered evidence if the new evidence relates to a material point contested on the trial, otherwise there would scarcely ever be a new trial granted on such ground."

See also *People* v. *Cattell*, 289 Ill. 207.

As pointed out in Bowers "Judicial Discretion of Trial Courts," (1931) Section 549:

> "The orthodox and technical statement of the rule was that cumulative newly found evidence is not sufficient to justify the award of a new trial. But this rule, as thus stated, was more honored in the breach than in the observance, and a qualifying adjective has been added which has an important bearing upon the power of a trial court in considering the motion when based on this ground. Under the rule as just stated, there is not a modicum of discretion resident in the trial court in passing upon this phase of the application. All that is required is a determination of whether or not the new evidence is cumulative. This is easily ascertained by a comparison with the other evidence given at the trial, and there is no choice of decision. *But under the rule now generally accepted, the adjective 'merely' has been pre-fixed to the term cumulative, and an entirely different meaning conveyed.* So, it is now said that a new trial will not be granted if the newly-discovered evidence is merely cumulative. [Citing cases.]

The qualification is material because the courts found that in a large percentage of such cases the new evidence, though in fact cumulative, might have a decisive effect if presented to a jury, and might reasonably produce a different result from that reached at the first trial, so that it would be an injustice not to give the party an opportunity to present it. Accordingly, revising the above statement of the present rule, and adding the necessary implication, *the precedents hold that the newly-found evidence, even though cumulative, will warrant a new trial if it reasonably appears therefrom that its introduction would probably change the result of the trial.*

"Section 550: The rule regarding the consideration of after-discovered evidence of an impeaching character, when it is offered as a basis of a motion for a new trial, presents the same features as that relating to cumulative evidence just discussed. Whatever apparent inconsistencies, conflicts, or tendencies the decisions may present, or whatever ineptitude of expression may occur in the reports, the ultimate and essential conclusion deduced from modern precedents is that if the evidence is merely impeaching or contradictory and nothing more, it is not ordinarily sufficient to warrant the granting of a new trial. But here again the rule is subject to an apparent exception as important as the rule itself. *The character of the new evidence may appear to be of sufficient strength and probative force to render probable a different result upon a re-trial, and the fact that it impeaches or contradicts a witness who testified at the first trial is merely incidental and becomes subordinate to this controlling feature.* This is not in reality an exception to the general rule as above stated. It is an extension of it and entirely in harmony with it. Hence, it may be expressed as the policy of the courts to grant new trials when the newly-found evidence seems strong enough to make it probable that the verdict on re-trial would be different from the one first returned." (Emphasis supplied.)

Reason and precedent both clearly show that after discovered evidence which would probably produce a different result on a new trial requires the grant of a new trial even though some or all of it may also be cumulative or impeaching.

2. The trial court erroneously ignored admission by the Government that its trial contention that Johnson was the owner of the gambling houses operated by the co-defendants is untrue.—We have demonstrated under Point II B 2 *supra*, p. 91, that the Government has repudiated and abandoned its claim that Johnson was in fact the owner of the gambling houses operated by the co-defendants and received all of the income from such houses. At the same place we demonstrated the importance of this post-trial admission by the Government. It is sufficient here to point out that nowhere in the trial court's opinion on the motion for new trial or in his opinion on the amended motion for new trial does he make so much as footnote reference to this crucial admission of the Government.

C. THE TRIAL COURT IGNORED THE FACT THAT ALL OF THE EVIDENCE ON THE MOTION FOR NEW TRIAL AND THE AMENDED MOTION FOR NEW TRIAL HAD BEEN INITIALLY CONSIDERED BY THE CIRCUIT COURT OF APPEALS AND THAT THE FIRST REMAND AND THE SECOND REMAND WERE MADE AFTER FULL CONSIDERATION AND OVER VIGOROUS OPPOSITION BY THE GOVERNMENT.

It is respectfully submitted that the circuit court of appeal in considering and disposing of a motion for remand under Rule II(3) of the criminal appeals rules promulgated by this court is required to determine whether or not the evidence submitted in support of the motion for remand would justify the trial court in granting a motion for new

trial.[51] The trial court on the motion for new trial treated the action of the court of appeals in remanding (as he treated the action of the court of appeals in reopening the proceedings and remanding for the filing of an amended motion for a new trial) as mere "ceremonial gestures" to be given no meaning or effect in considering the motion for new trial and the amended motion for new trial. This was clearly error (semble *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238).

This error alone demonstrates such a clear abuse of discretion as to require reversal of the trial court.

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[51] Such motions for remand, both under explicit authority of the rules and prior to the adoption of the rules, have uniformly been held to require a showing that the after-discovered evidence would justify the granting of the proposed motion for new trial. (*Angle* v. *United States*, 162 Fed. 264 (C. C. A. 4, 1908), *Martin* v. *United States*, 17 F. 2d 973 (C. C. A. 5, 1927), *Larrison* v. *United States*, 24 F. 2d 82 (C. C. A. 7, 1928), *Silva* v. *United States*, 38 F. 2d 465 (C. C. A. 9, 1939), *Perry* v. *United States*, 39 F. 2d 52 (C. C. A. 5, 1930), *Davis* v. *United States*, 47 F. 2d 1071 (C. C. A. 5, 1931), *Dowling* v. *United States*, 49 F. 2d 1014 (C. C. A. 5, 1931), *Horne* v. *United States*, 51 F. 2d 66, (C. C. A. 4, 1931), *Hause* v. *United States*, 54 F. 2d 517 (C. C. A. 2, 1931), *Dale* v. *United States*, 66 F. 2d 666, (C. C. A. 7, 1933), *LaBelle* v. *United States*, 86 F. 2d 911 (C. C. A. 5, 1936), *Hawkins* v. *United States*, 90 F. 2d 551 (C. C. A. 5, 1937), *Lee* v. *United States*, 91 F. 2d 326 (C. C. A. 5, 1937), *Isgrig* v. *United States*, 109 F. 2d 131 (C. C. A. 4, 1940), *Wagner* v. *United States*, 118 F. 2d 801, (C. C. A. 9, 1941), *Evans* v. *United States*, 122 F. 2d 461, 383 (C. C. A. 10, 1941), *Hines* v. *United States*, 131 F. 2d 971, (C. C. A. 10, 1942). *Hamel* v. *United States*, 135 F. 2d 969 (C. C. A. 6, 1943); *Levinson* v. *United States*, 32 F. 2d 449 (C. C. A. 6, 1929); *Markland* v. *Checker Cab Co.*, 142 F. 2d 95 (C. A. D. C., 1944).

In *Hamel* v. *United States*, 135 F. 2d 969 (C. C. A. 6, 1943) the court, pending appeal from conviction under a section of the Immigration Act similar to the White Slave Act, remanded to permit motion for a new trial or modification of sentence. Because the remand was for alternative action by the trial court, the District Court's order denying motion for new trial and modifying the sentence was not deemed a disregard of the appellate court's determination on the petition for remand and was, therefore, affirmed. *Hamel* v. *United States*, 138 F. 2d 508 (C. C. A. 6, 1943). In *Long* v. *United States*, 139 F. 2d 652 (C. C. A. 10, 1943) the evidence presented on motion for remand does not appear. Furthermore, apparently the witnesses actually testified in support of the motion in the trial court. In *Goodman* v. *United States*, 97 F. 2d 197 (C. C. A. 3, 1938), the ground for motion for new trial was after-discovered evidence affecting credibility of Government witnesses. Remand was agreed to by the Government and testimony of the witnesses relied upon by the defendant and by the Government, not produced before the Circuit Court of Appeals, was heard in the trial court.

IV.

THE CIRCUIT COURT OF APPEALS APPLIED NO IMPROPER STANDARDS IN REVIEWING AND THE RECORD REQUIRED REVERSAL OF, THE ORDER DENYING MOTION FOR NEW TRIAL.

In affirming a judgment reversing a trial court for abuse of discretion, this Court has ruled: "The informed judgment of the circuit court of appeals upon a view of all relevant circumstances is entitled to great weight. And, except for strong reasons, this Court will not interfere with its action." *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141.

There is plainly no merit in the Government's assertion that the decision of the court below merely expressed its own views as to the weight of the motion evidence. On the contrary, it is clear that it found the trial court guilty of so many conclusions from the evidence without support in reason or in law as to make plain the failure to exercise judicial discretion and the necessity for considered review of the evidence which the appellate court found showed unerringly that Goldstein's testimony was false in material particulars.

The Government in its first point (Gov't Br. 67) contends that the court erred in holding that the decision of the trial court was an abuse of discretion because this conclusion was based merely on its factual conclusion that Goldstein testified falsely at the respondents' trial (Gov't Br. 70, 72).

The Government's argument is invalid. The appellate court's finding of abuse of discretion was based, not on a mere review of the evidence *de novo* as the Government

contends, but on the amply justified conclusion as a matter of law that the trial court's decision was unreasonable and based upon errors of law.

The government's arguments appear to be based chiefly on a contention that the trial court failed to use in *haec verba* the words "unreasonable, arbitrary or capricious" (Br. 73-76). It is hardly credible that the government seriously advances such reliance on those words as constituting a ritualistic phrase indispensable to a valid finding of abuse of discretion. However, if use of such language is a *sine qua non*, a careful reading of the opinion of the circuit court of appeals, demonstrates that it is amply satisfied. On the other hand, if the question of whether the appellate court properly held the trial court to have abused its discretion is to be tested by reference to the evidence, it is plain that the examples cited by the government (Br. 73-74, note 29), fall far short of supporting its assertion that the appellate court merely reviewed the case *de novo* (Br. 73).

It is submitted that the most casual consideration of the majority opinion here sought to be reviewed discloses a keen sense of the limitation on the court's power to reverse for abuse of discretion.

The opinion of the court below is profuse with language indicating that the appellate court was directing its attention to the question whether the trial court's conclusions were "unreasonable, against logic or without justification in the fact or inferences to be drawn from them" (Cf. Gov't Br. 75). Dealing with the district court's refusal to accept the Green affidavits and acceptance of Goldstein's contradiction the court said (AR. 213): "*No reason* appears on the face of the record as to why he [Goldstein] should be

believed in preference to Green,"[52] The Court also corrected the district court's holding that the Green affidavit is "unreasonable and unworthy of belief" by showing corroborative undisputed facts with which it is consistent (R. 223-224).

Dealing with the Hess affidavits corroborated by those of Johnson and his brother[53] and their conflict with the denial of Goldstein the appellate court said of Judge Barnes (AR. 213):

> "After pointing out that Hess was at one time counsel for some of the co-defendants in the case, the court places a strained construction upon his testimony by stating that it 'could as well be taken to mean that he (Goldstein) was sorry he had testified at all, as it could be taken to mean that he was sorry he had lied.' We do not think the testimony of Hess is capable of such construction. * * *Any kind of logic or reason of which we are aware* requires the acceptance of Hess' version as true and that of Goldstein as false." (Emphasis supplied.)[54]

The court next dealt with the affidavit of Leo Blockus (R. 198) in which he stated that on both July 27, 1943,

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[52] The Government says that the improbability that Skidmore and Goldstein would seek a disbarred lawyer "regarding the partition suit" or admit that his testimony was false, furnishes good reason for believing Goldstein. This overlooks that the advice sought was as to how Skidmore could defend the partition suit and yet conceal his interest (and so continue to evade tax on the income which it represented) (R. 101), advice which might well subject the lawyer who gave it to criminal charges and disbarment. And the Government also overlooks that Goldstein's complete denial of the meeting to which Green refers in his third affidavit (R. 216) is offset by the corroboration of Green afforded by the affidavit of Engelbretson (R. 232-233).

[53] There is a significant discrepancy between the trial court's emphasis on John E. Johnson's fraternal interest in discounting his affidavit (R. 479) and his failure so to consider the filial interest, at least as great, in appraising the affidavit of Theodore Goldstein (AR. 152-154, 165).

[54] The Government states the majority was "under a misapprehension as to what 'Hess' version' was" (Br. 73, note 29). The cross-reference is to Gov't Br. 35-36 and the Government apparently relies on a "crucial" passage from a memorandum (Br. 36) prepared by Special Agent Read and signed by Hess (R. 245-247). All this shows is that Hess had already stated his best recollection of what was said and, as a lawyer, declined to offer what would obviously be objectionable as mere opinion testimony. This does not show that Hess' "version" was other than as stated by the circuit court of appeals. See pp. 68-69, *supra*.

and on July 28, 1943, Goldstein stated to him that the Albany Park Bank Building was his building and his property. The district court had held that denial of these statements was made by Goldstein, Levine, and Sampson (R. 493). The circuit court of appeals pointed out (AR. 214) that Levine had made a subsequent affidavit (R. 228) disclosing that Goldstein was already talking to Blockus at the latter's office when he, Levine, arrived, and Sampson came even later than he, and therefore they could not know what was said before their respective arrivals. The appellate court also called attention to the fact that the Levine and Sampson affidavits dealt only with the conference on July 28 and the Blockus affidavit as to statements of Goldstein on July 27 were denied by nobody but Goldstein. The opinion of the circuit court of appeals thus points out that the opinion of the trial court overlooks the important second affidavit of Levine and arbitrarily excludes from consideration the part of Blockus' affidavit concerning the statement of Goldstein made on July 27. The appellate court then points out the important corroborating circumstance that Goldstein's presence at the office of Blockus in the County Treasurer's office attempting to settle the claim for taxes against the Albany Park Bank Building is scarcely consistent with Goldstein's contention that Johnson owned the property. It might also be pointed out that Blockus' statement that Goldstein offered to pay the sum of $150 per month and later $250 per month to apply on the delinquent taxes (R. 198-199) for 1940-1943 (AR. 102) is not denied by Goldstein (R. 263-264) and such an offer in July 1943 is completely inconsistent with Goldstein's affidavit that all money of Johnson is being held by him subject to a United States government lien, of which notice was given him in the early part of 1940 (R. 252, 261). The circuit court of appeals concluded (AR. 214):

"Blockus certainly could have had no motive in making a false affidavit as to what Goldstein stated, and we see *no basis for a finding* other than that his testimony was true and that of Goldstein false." (Emphasis supplied)[55]

Dealing with the income tax returns the court used the unequivocal language (R. 219):

"We think the 'circumstances' destroy themselves, but more than that, the court, in accepting them as destroying the evidentiary value of the returns, has overlooked the essential point in the matter."[56]

The court's strong feeling with respect to the utter lack of logic in the trial court's treatment of the evidence is betrayed in its comment on the trial court's rationalization of Goldstein's leasing of the Albany Park Bank Building property. It said (AR. 220):

"We suppose, according to this reasoning, if Goldstein should lease this property from now until eter-

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[55] The Government cites (Br. 74, note) as a "basis for a contrary finding" its own Brief, pp. 51-52. The cited portion of the brief, aside from relying on the affidavits of Levine and Sampson, both rendered meaningless, as shown above, by the later affidavit of Levine and the fact that they did not purport to have been present at the conference of July 27, relies on the fact that Goldstein told Blockus the Government had a lien on the property without stating the name of the lienee (R. 253, 199). Argument that this was the equivalent of saying the property was Johnson's (Gov't Br. 51), is manifestly absurd.

The inference is equally open that this meant the property was Skidmore's. Lien against all of Skidmore's assets was effective at least as early as March 31, 1941 (see statement in letter of counsel, (R. 62-63) incorporated in the motion by reference (R. 13) and undenied by the government (R. 280 et seq)). In this connection it is important to note that a government tax lien is effective generally against all as of the date of demand of the taxpayer, but only as of the date of record as against mortgagees, pledgees, purchasers and judgment creditors, and as to mortgagees, pledgees and purchasers of securities only after actual notice. (I. R. C., secs. 3670-3672. 9 Mertens, Law of Federal Income Taxation, Secs. 54.38-54.42, 54.48, 54.50-54.51).

[56] The Government, while it refers to this criticism of the "circumstances" argument (Br. 74, note) fails to explain in what respect the appellate court ignored the evidence reached conclusions contrary to the facts established by the record, or in what way this shows review *de novo*. No suggestion is made by the Government at any time that the returns were made by the Goldsteins as the result of fraud, duress or mistake. The continued reference to "circumstances" without the elucidation of any rule of reason or of law applicable to bar consideration of the returns is inadequate to justify the trial court's holding (AR. 165) that the returns are not evidence of false swearing.

nity and retain the rents as long as he lives, it would not be inconsistent with his testimony that he purchased this property for and conveyed the title to Johnson. Further, it would not be inconsistent with the Government's theory that Johnson was the owner. *We do not agree with such reasoning.*" (Emphasis supplied.)[57]

Considering all the evidence with respect to the Albany Park Bank Building the court concluded: "We have a strong and abiding conviction that Goldstein's testimony concerning Albany Park Bank Building was false." (AR. 221.[58])

The trial court first ignored (R. 490) and then dismissed as merely cumulative (R. 499, 501) the unequivocal statements in the affidavits of Holleran and Guild (R. 128, 138) that Goldstein had claimed to both of them that $10.000 de-

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[57] The Government suggests (Br. 74, note) that the simple explanation is that the trial evidence showed Goldstein had been acting as agent for the building. Goldstein's admisson (R. 253) that he did not notify Johnson of the receipt of rent income from the Albany Park Bank Building on which income Johnson would have been required to pay an income tax if it was his, establishes that the agency was not for Johnson. To the same effect is the fact of his mailing monthly reports of income and disbursements on the Albany Park Bank Building to Skidmore (R. 165), unconvincingly denied (R. 254) by Goldstein (see *supra*, p. 56). Over a year after the trial and after Johnson had branded him publicly as a perjurer, Goldstein executed a five-year lease of the building and transferred to the lessee all of the stock in the Albany Park Safe Deposit Vault Company (R. 202, 205) and again in 1944 executed a lease for an additional ten years (AR. 76, 79). Goldstein admits he never made a single report to Johnson concerning the property—its maintenance, upkeep, management, or rental (R. 253). Instead he made such reports to Skidmore (R. 165-166). Admittedly he has never accounted to Johnson for a penny of the rents collected by him under the present lease or from any previous occupancy. Goldstein's offer to the County Treasurer to compromise the tax claim by payment out of the rents was never communicated to Johnson (R. 199), nor was the fact that Goldstein contracted to pay premiums of over $300 on the property for insurance demanded by the County Treasurer (R. 206, 207). Both the offer and payment were inconsistent with agency for Johnson, since under Goldstein's own affidavit all moneys held by him as agent for Johnson was subject to lien (R. 252).

[58] The Government apparently cites the statement of the circuit court of appeals (Br. 74, note) to show that that court merely reviewed the evidence and reached its own conclusion. This argument overlooks that the quoted language of the court's opinion is a conclusion based on the statement in the third preceding sentence: "In addition, the income tax returns and the long-term leasing by Goldstein are *utterly inconsistent* with his trial testimony." Plainly the circuit court of appeals was testing the trial court's decision by a single standard —whether it could be reconciled with reason.

posited in escrow by Goldstein was Goldstein's money, a statement in direct conflict with Goldstein's trial testimony that the currency for the deposit was received from Johnson "at whose request the deposit was made" (2 MR. 61). The circuit court of appeals pointed out (AR. 221) that Goldstein did not deny these statements although saying he did not recall them (R. 251-252).

The court found (AR. 223) that the Fowler affidavit as to inconsistent statements by Goldstein to the effect that he had bought the Bon Air Country Club for Skidmore could not rightly be rejected merely on the ground that he was a discharged employee. The appellate court accepted the Fowler affidavit because there is nothing in the record impugning Fowler's reputation and he is not shown to have any connection with any of the parties or any motive for false swearing.

Speaking of the Marsh and Peacock affidavits which the trial court held merely cumulative (R. 504) the circuit court of appeals held that they furnished convincing proof of the truth of Johnson's testimony that he was the owner of only one-half interest in Bon Air and furnished strong circumstantial proof of the falsity of Goldstein's testimony that he bought the property for Johnson and demolished the implication which was drawn therefrom and used by the Government to such good advantage (AR. 225). The court also points out that the trial court overlooked the relevance of the same affidavits to show motive on the part of Goldstein by disclosing his plan to keep secret the one-half ownership of Skidmore in the property.[59]

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[59] The Government's objection (Br. 74, note) that the Marsh and Peacock affidavits were cumulative on the issue of ownership of Bon Air also overlooks that they were pertinent on the issue of motive and practice of Goldstein to conceal Skidmore's property interests and therefore not cumulative as to the issue of falsity of Goldstein's testimony, the new and distinct issue presented by the motion for new trial.

Dealing with the affidavits of Goldstein the court again uses the language of law rather than fact appreciation when it says of such affidavits (AR. 225): "The proof therein contained affords *no substantial support* for a finding that he testified truthfully at the trial." The court stated that the conviction it entertained with respect to Goldstein's testimony was "without reservation."[60]

The court alluded to the fact that on review of the first motion for new trial it had held that it could not say that the newly discovered evidence "*inevitably* leads to the conclusion that Goldstein had testified falsely." (Emphasis supplied.) It there recognized the degree of certainty required to be entertained by the appellate court with respect to the conclusions to be drawn from the evidence before reversal for abuse of discretion could properly be had. Continuing to recognize this application of the rule to evaluation of facts the court said in its second opinion (AR. 227):

> "It is not necessary, however, that we retract our previous holding regarding the 'abuse of discretion' rule."
>
> "It is our conclusion that the proof offered in support of the original and amended motion, with the attending circumstances, *unerringly* points to the fact that Goldstein's trial testimony was false. The finding of the trial court to the contrary was, in our judgment, an abuse of discretion." (Emphasis supplied.)

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[60] In *Corica* v. *Ragen*, 140 F. 2d 496 (Evans, Kerner and Minton, JJ.) the court below found that the trial court had improvidently issued a preliminary injunction. The court dissolved the injunction, deeming its issuance an abuse of discretion on the basis of the facts disclosed by the defendants' affidavits and because "the only grounds for granting the injunction were to be found in the unsupported, contradicted and impeached affidavit of plaintiff * * *" (p. 499). The trial court's reliance in this case solely upon the "unsupported, contradicted and impeached" affidavits of Goldstein was equally clearly an abuse of discretion.

Again, dealing with the trial court's reliance on the *Berry* case as being the rule of law that governs consideration of the motion (AR. 136) the appellate court said (AR. 228):

> "We think that *logic* and *sound reasoning* require the application of a different rule". (Emphasis supplied.)

It is therefore submitted that the Government's contention that the appellate court did not determine whether the trial court's factual conclusions were unreasonable is utterly without merit. Its statement that the court's conclusions are contrary to the facts disclosed by the record is attempted to be supported by cross-reference footnotes (Br. 73-74, note) to the Government's own evaluation of the affidavits in its argumentative statement of facts. As shown in footnotes 52 to 59 *supra*, the Government's argument discloses inferences and suppositions from the evidence so tenuous that they necessarily dissolve in the face of the solid block of direct and corroborative evidence to the contrary.

Opportunity of trial court to observe demeanor of witnesses at trial cannot affect scope of appellate review of orders based solely on affidavits and documentary evidence. —The circuit court of appeals, contrary to the Government's contention (Br. 77) did not hold that the scope of review was enlarged "because some of the evidence under consideration may consist of affidavits or documents." The court below merely held that where the evidence impelling to its conclusion was all by affidavit or in documentary form, and the trial court had obviously neither seen nor heard the witnesses, the appellate court can take cognizance of the fact that it is in as good a position to evaluate the testimony as is the trial court (AR. 226). Therefore, having held that consideration of such evidence

created the conviction that the conclusion of the court below was without support in reason there was not present the additional factor—that the court below had had opportunity to observe the demeanor of the witnesses—which might otherwise cause the appellate court to even then forbear to hold the action of the trial court unreasonable.

Where, as here, the record is entirely documentary, it is the clear duty of the reviewing court in any event to examine the record and determine for itself the meaning of the written evidence. As pointed out by Robert L. Stern, Review of Findings of Administrators, Judges and Juries (1944), 58 Harv. L. Rev. 70, 112-113:

> "But where the evidence is entirely documentary or otherwise undisputed, the appellate court is in as good a position as the trial judge to determine the facts and to draw inferences of fact."

(See also id., pp. 111, 114.) The discussion of this point is elaborately documented with supporting authorities. This has long been the recognized rule. *The Natal*, 14 F. 2d 382, 384 (C. C. A. 9) cert. den. 273 U. S. 748; *Uihlein* v. *General Electric Co.*, 47 F. 2d 997, 1001 (C. C. A. 7); *Nashua Mfg. Co.* v. *Berenzweig*, 39 F. 2d 896, 897 (C. C. A. 7); *Kaeser & Blair* v. *Merchants Ass'n*, 64 F. 2d 575, 576 (C. C. A. 6); *The Marsodak*, 94 F. 2d 339, 341 (C. C. A. 4); *United States* v. *Corporation of the President*, etc., 101 F. 2d 156, 160 (C. C. A. 10); *Groves Laboratories* v. *Brewer & Co.*, 103 F. 2d 175, 178 (C. C. A. 1); *Himmel Bros.* v. *Serrick Corporation*, 122 F. 2d 740, 742 (C. C. A. 7); *Bowles* v. *Carnegie-Illinois Steel Corp.*, 149 F. 2d 545, 546 (C. C. A. 7). It has been given the same application in cases where the relief involved was discretionary. *Nashua Mfg. Co.* v. *Berenzweigh, supra* (citing *Elbers et al.* v. *Chicago Printed String Co.*, 39 F. 2d 315); *Corica* v. *Ragen*, 140 F. 2d 496. It is equally applica-

ble in cases involving review of action on motions for new trial. *Hamilton* v. *United States*, 140 F. 2d 679, 681 (App. D. C., 1944), reversing *Hamilton* v. *United States*, 31 A. 2d 887 (see dissenting opinion, p. 891); *Arbuckle* v. *United States*, 146 F. 2d 657 (App. D. C., 1944).

The government relies (Br. 77-78) on the fact that at the trial the trial judge had seen and heard Goldstein as well as some of the other witnesses whose affidavits are submitted, as a reason for abrogating the recognized rule.

But it seems obvious that even if all of the witnesses whose affidavits are submitted in support of the motion for new trial had been witnesses in the main trial and their demeanor observed by the trial court, he would be in no better position than the appellate court to determine the truth of matters stated in their affidavits in this court.

Demeanor as an aid to evaluation of a witness' truthfulness is limited to the demeanor of the witness on the stand at the time he is swearing to the testimony being evaluated.

The error is emphasized when the affidavits in question relate to matters not covered in the trial testimony, for even if it be assumed that the trial court clearly decided to disregard the affidavits of those who were also witnesses because of their shifty or evasive demeanor at the trial, he could do so only by concluding that under any and all circumstances those witnesses would lie. Conversely, under such a rule, he could accept their affidavits only if by reason of their demeanor at the trial, he had concluded that under any and all circumstances they would tell the truth.[61] The obvious invalidity of this necessarily under-

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[61] Aside from its obvious invalidity as an abstract proposition, the absurdity of such a conclusion in this instance is shown by the fact that 23 men constituting a Grand Jury were so convinced that Goldstein lied on the stand before them in an investigation of income tax evasion by Skidmore that they returned an indictment against him, still pending, for perjury (2 MR. 65).

lying assumption exposes the fallacy of the Government's contention. However, the Government would have this court go much further and find in substance that because Judge Barnes was beguiled by Goldstein's frank and honest countenance at the trial, he can on the basis of his recollection of Goldstein on the witness stand, properly reject the testimony of any other person who gives evidence to prove Goldstein, despite his convincing demeanor, was not truthful and, in fact, was defrauding the court by giving false testimony. No responsible court has ever claimed as much for itself or for any trial judge. In fact, the contrary has been squarely held. *Hamilton* v. *United States*, 140 F. 2d 679; *Arbuckle* v. *United States*, 146 F. 2d 657.

The trial court obviously could not have weighed Goldstein's demeanor against Fowler's demeanor, *for he never saw Fowler*. Nor did he see any but a few of the witnesses whose affidavits were submitted by defendants. He, therefore, had no basis for weighing their demeanor against Goldstein's demeanor. To assume, *without seeing them*, that these witnesses would on the witness stand have demeaned themselves less convincingly than did Goldstein, would constitute a clear abuse of discretion.

We have not charged that the trial court abused his discretion by doing so because we can find no basis in his opinion for concluding that he made this error. It is apparent, however, that if the Government's contention that he did so be accepted, the Government has called to the court's attention a further and most serious error on the part of the trial court.

The Government asserts, without citation, that the majority opinion below "indicates a misunderstanding of the factual issues and a lack of familiarity with the trial testimony" (Gov't Br. 78). This assertion is unsupported

and alleged examples given in the footnote on Gov't Br. pp. 73-74 have been shown to be utterly without support. The opinion of the trial court despite its length suppresses the significant content of many of the affidavits and arrives at its conclusions by a definite confusion of the issue of ownership to which similar evidence was directed at the trial and the issue of falsity to which the affidavits in support of the motion and amended motion for new trial were primarily addressed.

Having found that the Trial Court abused its discretion in that its findings from the evidence were without support in logic or reason, and having found that the trial court applied the wrong rules of law, the appellate court had full power to proceed to a complete disposition of the case. R. S. sec. 701, 28 U. S. C. 876 made applicable to the Circuit Court of Appeals in the Act of March 3, 1891, c. 517, sec. 11, 26 Stat. 826; see *Ballew* v. *United States*, 160 U. S. 187, 201-202; *Realty Co.* v. *Montgomery*, 284 U. S. 547, 550; *Cole* v. *Ralph*, 252 U. S. 286, 290. The court below did not substitute its findings for those of the trial court. It made findings because no findings under the applicable rule of law had been made by the trial court.

The only point in the Government's brief in form addressed to the action of the court whose judgment is sought to be reviewed is, therefore, without merit.

CONCLUSION.

The only point of law here urged by the government and open for consideration on the writ, if lack of specification of error be disregarded is plainly without merit. The other contentions of the government as well signally fail to present any ground for reversal of the circuit court of appeals. The circuit court of appeals clearly conceived the prevention of use of perjured testimony in

criminal prosecutions to be a matter of public interest at least as great as that involved in guarding against perjury and inequitable conduct in the exploitation of the patent laws. *Precision Co.* v. *Automotive Co.*, 324 U. S. 806, 816 reversing 143 F. 2d 332 (C. C. A. 7). That view has been repeatedly affirmed by this Court. *United States* v. *Atkinson*, 297 U. S. 157, 160; *Johnson* v. *United States*, 318 U. S. 189, 200.

Wherefore it is respectfully submitted that the judgments of the court below should be affirmed.

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APPENDIX.

1. Bon Air Country Club.

Goldstein's testimony concerning the Bon Air Country Club was that he carried on negotiations for its purchase at the request of Johnson, that he purchased the property with $75,000 he received from Johnson, that title to the property was the first taken in the name of Ted W. Goldstein and subsequently a quitclaim deed was delivered to Johnson.

The Bon Air Country Club was purchased by Goldstein in the latter part of 1937 (2 MR. 57). Goldstein told Fowler (R. 213) "that he had bought the property known as the Bon Air Country Club for his client, Mr. William Skidmore, . . ." and "That Mr. Skidmore had given him (Goldstein) the money to buy the said Bon Air Country Club property.* On one occasion Goldstein told Fowler to have a picture of this property enlarged and framed saying, "The Boss (Skidmore) has enough money in the place. He ought to have a picture to look at" (R. 215). Before Goldstein purchased this property for Skidmore, Skidmore had unsuccessfully negotiated for its purchase through Sam Hare who collaborated with Goldstein in the negotiations (3 MR. 914). Skidmore had the property appraised prior to its purchase by Goldstein by Joseph Nadherney, an architect (R. 98).

Henrichsen who had been employed by William R. Skidmore during the years 1934 to 1937 inclusive swore: "That in the month of December 1937 one William Goldstein came to my home one evening on or about December 15, 1937, and the said Mr. Goldstein stated to me that William R. Skidmore told him to come to my home to inform me that I was to be the caretaker at the Bon Air Country Club and that I was to report to Mr. Becker at the Evanston State Bank the next morning for a letter of instructions; that this affiant told the said Mr. Goldstein that he wanted his instructions from Mr. Skidmore, whereupon Mr. Goldstein took

*This corroborates not merely defendant Johnson's testimony (3 MR. 955 *et. seq.*) but also the testimony of Edward Wait (3 MR. 896).

this affiant to the home of Mr. William R. Skidmore at 3500 Sheridan Road, Chicago, Illinois; that he saw Mr. William R. Skidmore at the said place and Mr. Skidmore said I was to be caretaker at the Bon Air Country Club and to get my instructions from Mr. Becker; that Mr. Skidmore stated that he had bought the said Bon Air Country Club." (R. 91).

Skidmore offered to sell defendant Johnson a half interest in it. Johnson, after inspecting the property at Skidmore's suggestion, accepted his offer and agreed in the early part of 1938 to purchase a half interest in the property (3 MR. 956). At the time of purchase the property was in foreclosure. Goldstein acquired the rights of all the bondholders and had Peacock appointed trustee. He did not have title "first taken in the name of Ted W. Goldstein" (R. 194). More than a year and a half later Goldstein arranged for the transfer of the title to Johnson. At the time he delivered a deed to Johnson he had Johnson execute a quitclaim deed conveying back to Skidmore an undivided one-half interest in the property (3 MR. 963, 964). Goldstein had the deed to Johnson and the quitclaim deed which conveyed to Skidmore a ½ interest in this property prepared by Mrs. Marsh in his office (R. 163-165), and after signature by Johnson, had the quitclaim deed acknowledged by William Peacock (R. 188). Extensive improvements were made to the property by Skidmore and Johnson under the close personal supervision of Skidmore who personally paid out large sums in payment therefor (R. 82, 86, 94, 104, 105, 107, 110, 162, 167, 174, 186). After the club had been remodeled and was opened by Skidmore and Johnson, Skidmore continued to exercise an extremely active supervision over it in all matters, including hiring and firing the employees, employment of talent for the floor shows, ordering food for the restaurant, and the like (R. 99, 103, 109, 120, 122, 173, 176).

Shafron states (R. 81) "That in the month of January or February 1938 he called on the said Mr. William Skidmore at his place of business located at 2840 South Kedzie, Chicago, Illinois. That on the occasion of that visit the

said William R. Skidmore stated to him that he, Skidmore, and Bill Johnson owned the property known as the Bon Air Country Club, north of the town of Wheeling, Illinois." Skidmore admitted his proprietory interest in it on numerous occasions after the trial of these cases was commenced (R. 83, 91, 99, 101, 109, 112, 215). Skidmore told Henrichsen that he had paid the real estate taxes on this property and had the paid bills in a safe deposit box (R. 95). In order to protect Goldstein from disclosure of the latter's false and perjured testimony to the effect that he had made the original purchase for Johnson with money given him by Johnson (2 MR. 57, 58), Skidmore agreed, at Goldstein's solicitation, not to interpose any defense in a partition suit commenced by Johnson to force a public disclosure of Skidmore's interest (R. 90, 101). Goldstein acted as Skidmore's agent in several matters concerning the Bon Air after its purchase. Henrichsen for example swore (R. 92) that during his employment at the Bon Air Country Club from on or about December 15, 1937 up to March 1, 1938 he received his salary for his services from William Goldstein who stated to him that Skidmore furnished him the money and directed him to pay Henrichsen his salary. The Bureau of Internal Revenue served a notice of lien on the operating corporation for this property in an attempt to attach Skidmore's assets for the payment of his delinquent taxes (R. 62-63).

2. Curran Farm.

Goldstein testified that he, acting on the request of Johnson, purchased the Curran Farm with currency provided by Johnson and that a deed to the property was delivered to Johnson (2 MR. 58, 59).

The title to this property was taken in the name of a dummy at the time of purchase. Goldstein recorded title to this farm in Johnson's name on July 21, 1939. At the time he delivered a deed to Johnson covering this property he had Johnson execute a quitclaim deed conveying an undivided one-helf interest in the farm to Skidmore (3 MR. 963, 964). The quitclaim deed conveying an undivided

one-half interest back to Skidmore, like the one for the Bon Air, was prepared by Beatrice Marsh in Goldstein's office (R. 164), and acknowledged by William R. Peacock (R. 188).

Shortly after Goldstein closed the deal Skidmore inspected it and said he had bought it. Marie Schmidt and her son (R. 191, 192) who lived in the farm house were given notice to quit by Henrichsen whom Skidmore told he had purchased the farm (R. 86, 87); and later by Goldstein, acting on behalf of Skidmore (R. 191, 192). Alice Kemp (R. 120) an employee of Skidmore's was permitted by him to reside in the farm house at Henrichsen's suggestion (R. 120, 121). She was cautioned not to disclose Skidmore's interest in the property (R. 122). The landlord's share of the crops was claimed by Skidmore through Goldstein from Stewart Peters, (R. 187), who farmed the property on shares and who dealt only with Henrichsen and Skidmore's lawyer, Goldstein (R. 187). In the year 1940 Skimore ran the farm through Henrichsen. When the harvest was in, Skidmore's trucks came and hauled away the landlord's share of the crops (R. 93, 124, 187). Skidmore employed a farm manager for the Curran Farm upon the recommendation of Frank Fowler, at Goldstein's request. Goldstein told Fowler he bought the Curran Farm for the Boss, Mr. Skidmore (R. 215). Goldstein, as Skidmore's agent, directed Henrichsen to chop down an advertising sign on the property. Skidmore countermanded this order (R. 88). In the summer of 1939 Goldstein notified the General Outdoor Advertising Company (R. 144) that he was agent for the property and that the rent of $25.00 a year for the sign on the property should be paid to him. Goldstein received and cashed three checks for $25.00 each (R. 145-149). Two of these checks bear the endorsement not only of Goldstein but of Sam Cinofsky, an employee of Skidmore's (R. 145, 147, 174). None of the sums realized from any of these checks was ever tendered to defendant Johnson, nor was he advised of their receipt by Goldstein. Goldstein was never authorized by Johnson to act as his agent for any purpose in connection with the Curran farm property (R. 235).

3. Green House.

Goldstein's testimony concerning this property was that, at the request of Johnson, he purchased the property with $8500 in currency furnished to him by Johnson, that title to the property was taken in the name of Ted W. Goldstein, and that thereafter a quitclaim deed was delivered to Johnson by Goldstein. (2 MR. 58).

The Green House was purchased by Goldstein through Frederick Kirschner, a real estate agent who represented Albert Tatge, the owner of the property. (R. 123)* Before he bought the property Skidmore had Nadherny appraise it for him and later told him that he had bought and furnished the "Green House." (R. 99). Johnson purchased a one-half interest in the property from Skidmore, and in the summer of 1939 Goldstein recorded the property in Johnson's name. At the time he gave Johnson the deed for the property he had him (3 MR. 963, 964) convey back to Skidmore by quitclaim deed an undivided one-half interest in it.

The quitclaim deed was prepared by Beatrice Marsh (R. 163) in Goldstein's office and Johnson's signature acknowledged by Peacock (R. 188).

Skidmore bought furnishings for this house and gave Henrichsen money to pay for them and Mrs. Skidmore helped to supervise the installation of the furniture (R. 92). Tatge bought back from Skidmore through Henrichsen a hot water heater and softener not being used in

*Kirschner swears (R. 123) "that he considered the owners of the Bon Air Country Club as a likely prospect to purchase the property owned by Mr. Tatge. That he made due inquiry as to whom he might contact with reference to offering the Tatge property to the owners of the Bon Air property. That as a result of that inquiry he learned that Mr. William R. Skidmore would be the individual to see as the party interested in the Bon Air, and a possible purchase of adjacent property. That as a result of that inquiry he determined that Mr. Skidmore had his office at 2840 South Kedzie Avenue, Chicago, Illinois, and at that location saw Mr. William R. Skidmore and offered to him the purchase of the Tatge property aforementioned. That after some discussion, the said Mr. William R. Skidmore directed this affiant to see his attorney, William Goldstein, at Mr. Goldstein's office located at 140 North Dearborn Street, Chicago, Illinois. This affiant further says that in accordance with such direction from Mr. William R. Skidmore he did see Mr. Goldstein and that the sale of the Tatge property was consummated through Mr. Goldstein."

the house (R. 168). Henrichsen further swore that in January, 1940 (at about the time Goldstein's false testimony was given before the grand jury investigating Skidmore) Skidmore directed him to see Tatge, who was the former owner of the Green House, to caution Tatge not to mention Skidmore's name in connection with the purchase of that property. Henrichsen sought out Tatge and asked him whether he could prove that Skidmore had purchased the Green House and Tatge said that he could not (R. 95, 169)

4. White House.

Goldstein testified that he purchased this property with $8,000 in currency received from Johnson, that he caused title to be taken in the name of Ted W. Goldstein, and that subsequently he delivered a quitclaim deed to the property to Johnson. (2 MR. 58)

Goldstein purchased this property in May, 1938 through Kirschner (R. 123). Skidmore had Nadherny (R. 99, 85) appraise this property, (as he did in the case of the Bon Air and Green House) for him before he bought it. Skidmore told Henrichsen he was going to buy it and later that he had bought it. Henrichsen was present when Nadherny made his appraisal. (R. 85) Johnson later bought a half interest in it from Skidmore. In the summer of 1939 Goldstein had title to this property recorded in Johnson's name and when he gave Johnson a deed, had Johnson (3 MR. 963, 964) execute a quitclaim deed conveying an undivided half interest in it back to Skidmore.

This deed also was prepared for Goldstein by Beatrice Marsh (R. 163-5) and, after signature, acknowledged by Peacock (R. 188).

Skidmore told Henrichsen that he had purchased this property and told him that he could live in it with his family. After the Bon Air closed Skidmore told Henrichsen (R. 94, 97) he could continue to live at the White House and Skidmore would pay him to act as watchman to protect Skidmore's interests at the Bon Air. Henrichsen and

his family did so (R. 94, 97). Fuel oil consumed on this property was purchased and paid for by Skidmore from the Sinclair Refining Company (R. 88, 179-84 in the winter of 1941-42).

5. Gas Station.

Goldstein testified that he purchased this property with $4,000 in currency furnished him by Johnson and caused the title to be taken in the name of Ted W. Goldstein, and that subsequently he delivered a quit-claim deed to Johnson. (2 MR. 58).

This as well as the White House and Green House properties were purchased by Goldstein through Frederic Kirschner (R. 123). Skidmore also had this property appraised by Nadherny prior to its purchase (R. 99). Johnson (3 MR. 963, 964), as with the Bon Air and other adjacent properties, bought a half interest in the gas station property from Skidmore. In the summer of 1939 Goldstein recorded title to this property in Johnson's name and upon delivery of a deed to Johnson had him execute a quitclaim deed conveying back an undivided one-half interest in the property to Skidmore.

This quitclaim deed like the others was prepared by Beatrice Marsh (R. 163-165) and, after signature, acknowledged by Peacock (R. 188).

Skidmore purchased and paid for the gasoline pumps for the "Gas Station" (R. 93). Skidmore personally arranged for the rental of the gas station to Walter Piper (R. 119), and Henrichsen (R. 86) pursuant to direction from Skidmore turned over the keys to Piper. Later, Alice Kemp and her son at Skidmore's direction operated the gas station. (R. 121, 86).*

* It will be seen with respect to all of the five items listed above (the Bon Air and adjacent properties), that the same pattern was followed; Skidmore had Goldstein purchase them for him and later sold a half interest in them to Johnson. In the summer of 1939, when a Federal grand Jury instituted an investigation of Skidmore's tax evasion, Goldstein had title to these properties, up to then recorded in the name of dummies, recorded in Johnson's name. At the time of delivery of deeds to Johnson for these properties he had Johnson execute quitclaim deeds conveying back to Skidmore an undivided half

6. Facts as to "Dells" property.

Goldstein testified that he purchased this property at the request of Johnson with $19,000 in currency furnished by Johnson, that title was taken in the name of Isador Goldstein, and that subsequently quit-claim deeds were executed by Isador Goldstein to Johnson and delivered to him by Goldstein. (2 MR. 59).

Skidmore learned through Sam Hare that the "Dells" property could be purchased cheaply. (R. 117). He advised Johnson of this fact and Johnson agreed to purchase a one-half interest in it with Skidmore. (3 MR. 955.) Skidmore handled the purchase of this property personally with Goldstein and Hare through one Eli Herman, attorney for the property owner. (R. 231.) The owner of the property was one Fred Huscher who was informed by Goldstein during the course of the negotiations that Skidmore was one of the prospective purchasers. (R. 178.) (Goldstein denied that he mentioned the name of the purchaser to Huscher.) (R. 260.) Skidmore himself inspected the property and talked with Huscher before the deal was closed. (R. 178.) Skidmore agreed to buy it at a Sunday conference at his apartment with Goldstein, Herman, Huscher's lawyer, and Hare. He offered Herman $10,000 in cash on that occasion but Herman said he did not want to take the money at that time. Goldstein said that he would get the money next day and deliver it at the Chicago Title and Trust Co. (R. 231). Goldstein's testimony confirms the fact that he went to the Trust Company with the money. (2 MR. 59.) Shortly after the deal was closed Skidmore removed some iron rods and a number of tables and chairs

interest in them; both the deeds to Johnson and the quitclaim deeds were prepared under Goldstein's direction by Mrs. Marsh, who was employed in Goldstein's office, and Johnson's signature to all of them was acknowledged by Peacock, an associate of Goldstein's. So far as Johnson was concerned it was of no moment to him that his one-half interest in these properties might become known to the world, as his reported income was more than adequate to account for his expenditures in connection with the properties. He obviously did not realize that this transfer of nominal title was a step in Goldstein's and Skidmore's plan to charge him with 100 per cent ownership of the properties so that Skidmore would not be charged with expenditures which could not be reconciled with his reported income. (See *United States* v. *Skidmore*, 123 Fed. 2d. 604, 608-609.)

from the property. (R. 177, 178.) In the spring of 1937 Skidmore removed some concrete lamp posts from the property. (R. 175, 177.) Skidmore paid Hare (R. 118) $500 for his services in the acquisition of the property, and paid Herman (R. 232), through Goldstein, $300 attorney's fees. After the deal was closed, Johnson paid Skidmore one-half of the cost of the acquisition, as is evidenced by a receipt in Skidmore's own handwriting listing the costs of acquisition of the property including payments for services to Hare, Herman, and Goldstein in the amounts each admitted he received. (R. 159) Skidmore told his employee, Henrichsen, that he had acquired a one-half interest in this property. (R. 95.) Goldstein several times discussed Skidmore's purchase of the property and his plans for rebuilding it with Hare in the presence of Pearl Ferguson. (R. 189.)

7. Facts as to 9730 Western Avenue property.

Goldstein testified on direct examination with respect to this property (as he had with respect to all of the other properties mentioned above) that he had bought it for Johnson with money given him by Johnson and that he delivered the deed to Johnson (2 MR. 55, 56).

Skidmore, at about the time the "Dells" deal was closed with Huscher, told Johnson of his proposed purchase of property at 9730 Western Avenue and asked Johnson to take a one-half interest in it. Johnson agreed (3 MR. 973.) Skidmore had Goldstein purchase the property.

Goldstein (2 MR. 65) admitted on cross-examination (when confronted with the quitclaim deed for one-half interest he had delivered to Johnson) that Johnson had only a one-half interest in it, and that he had given a quitclaim deed to Skidmore for the other one-half interest.*

* Defendants moved to reserve cross examination of Goldstein on properties other than the "Dells" and 9730 Western Avenue after he identified a memorandum receipt to Johnson in Skidmore's handwriting which itemizes various costs of acquisition of the "Dells", and had admitted Johnson owned only a half interest in the 9730 Western Avenue property. This motion was denied on objection of Assistant United States Attorney Hurley. (2 MR. 67.) Defendants, taken by surprise by Goldstein's testimony, and not being prepared, could not cross-examine him concerning his other testimony.

Nadherny designed and supervised the construction of a building on this property, and was paid $22,400 by Skidmore (2 MR. 79), which covered the cost of the improvement. Johnson paid Skidmore one-half of the cost of acquiring and improving this property. (3 MR. 973.) Skidmore told Henrichsen that he owned this property. (R. 89, 90.)

8. $10,000 escrow.

Goldstein testified (2 MR. 61) that Johnson gave him $10,000 to be placed in escrow for the purchase of certain property lying between the Curran Farm and the Bon Air Country Club and that he placed the $10,000 in escrow with the Chicago Title and Trust Co.

On November 1, 1940, Goldstein wrote to Holleran (R. 130), attorney for John W. Guild, trustee for the owners of the property, disclosing a demand on the Chicago Title and Trust Company for the return of the $10,000 escrow deposit to Goldstein. Shortly thereafter a meeting was arranged in Holleran's office between the latter, William Goldstein, Isador Goldstein* (Goldstein's partner) and Mr. Guild. (R. 131-132.) Goldstein there stated that he represented himself and that he wanted the deposit returned. Holleran stated that there was a lawsuit pending for damages against the Bon Air Country Club and that before he Holleran would authorize the Chicago Title and Trust Company to release the escrow, an adjustment of expenses would have to be made.

Goldstein replied that he had no interest in the Bon Air Country Club; that his only interest was in the return of the $10,000; that the $10,000 was his (Goldstein's) money and had nothing to do with the club. He offered $100 to compensate for attorneys' fees and expenses if the deposit would be returned to him. (R. 133, 134.) One Joe Miller, an attorney acting on Goldstein's behalf, renewed the $100

* Isador Goldstein was not called upon by the government to furnish an affidavit denying the facts as sworn to by Holleran.

offer, and on November 6, 1940, wrote Holleran regarding the same subject matter. Holleran inquired of Goldstein whether "Uncle Sam had any objection" to any withdrawal of the escrow; Goldstein said the Government had nothing to do with it, that it was his money, and was in no wise involved in the Government case. (R. 134.) Goldstein said "All I am interested in is my money. It is my money I put up and you can't deliver under the contract and I want my money back." (R. 135, 136.) Goldstein told Fowler (R. 214) when Fowler told him that money was needed by the Waukegan Post that he (Goldstein) had this $10,000 deposit available. Henrichsen (R. 95) states that Skidmore told the affiant that he (Skidmore) had $10,000 in escrow and that Johnson had no interest in the $10,000 and that he (Skidmore) had attempted through William Goldstein to withdraw the said $10,000 from escrow.

Goldstein in a rebuttal affidavit (R. 252) swears "I do not recall at any time stating that it was my money; there would be no purpose in making that statement." He also claims that he was served with a notice by the Collector of Internal Revenue, in early 1940 covering all property and money he then held belonging to Johnson. (R. 261.)

9. *$7500.00 escrow.*

Goldstein testified at the trial with respect to this item that, "The amount of money involved was $7,500, deposited at the State Bank of Evanston, in the form of currency, by myself, which I received from Mr. Johnson. I made the deposit at his request." (2 MR. 61.)

Shortly after the trial of this cause in the District Court on October 30, 1940 Goldstein withdrew this money from escrow. (R. 185) He did not advise Johnson of its withdrawal nor has he made any tender of it to him. (Goldstein admits this but claims he is holding the money subject to a notice from the Collector of Internal Revenue for Johnson's allegedly delinquent taxes, served on him early in 1940. R. 261.) Johnson testified that the money was not his and had not been given to Goldstein by him. (3 MR.

957.) Goldstein told Fowler that the $7500.00 escrow deposit belonged to him at the time of the discussion concerning the need of the Waukegan Post for additional money, and later told Fowler he had withdrawn it. (R. 214.)

10. Albany Park Bank Building.

The Albany Park Bank Building was purchased by Goldstein from a receiver in July 1937. Title to the building was transferred on that date to his son, Ted Goldstein. The stock of the Albany Park Safe Deposit Vault Company was also transferred by the receiver to Ted Goldstein at that time as a part of the same transaction. (R. 151.) On the day that Ted Goldstein took title he leased part of the premises to the Vault Company for the continued carrying on of the business of that company. (R. 153.) William Goldstein was made President and Director of the Company. Louis Levinson* was made Secretary and Director and Ted Goldstein Director. In September 1941 Goldstein as agent for his son, Ted, leased the building to the Hines Realty Company and under that lease all of the stock of the Albany Park Bank Building was transferred to Frank Sampson, owner of the Hines Realty Company. (R. 202.)

The Goldsteins and Levinson thereupon ceased to be officers and directors of the company and Frank Sampson, M. H. Optner and Marshall Sampson became the new directors with Frank Sampson as President. Goldstein has also given Sampson an option to purchase this building. (R. 238.) Goldstein has collected the rents of $250.00 per month under this lease and has cashed the rent checks for his private account after endorsing them William Goldstein, Agent, and then William Goldstein. (R. 199, 200.) This lease is still in force. Prior to leasing the premises to Sampson, who operates a real estate business there (R.

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* Louis Levinson was a co-incorporator with Goldstein of the Portage Park Safe Deposit Vault Company, a corporation utilized by Skidmore in connection with the Portage Park Safe Deposit Bank Building, a property owned by Skidmore and managed for him by Goldstein. The outstanding perjury indictment against Goldstein is based upon false testimony concerning activities in this building, given before the Grand Jury investigating Skidmore's income tax evasion.

201), Goldstein for a time leased part of them to co-defendant Brown, who ran a currency exchange there.

In August of 1943 Goldstein stated to Leo Blockus (R. 199) representative of the County Treasurer, who had instituted a tax receivership proceeding against the property, that he, Goldstein, owned the building. (Goldstein denies making this statement, R. 264.) Goldstein offered to pay, first, $150, and later $250 a month out of the rents of this property to the County Treasurer as receiver (R. 198, 199) and, at the insistence of the County Treasurer's Office took out insurance covering the property, the premium on which was over $300. (R. 206-212) Sampson, Goldstein's tenant, told Levine and Blockus in the course of official discussions relating to the tax receivership, that he had an option to purchase the property. (R. 202, 338.) He told Louis Baum, his business associate, that he had such an option when Baum was discussing with him the formation of their business association, mentioned it on several other occasions and again stated that he had the option after the tax receivership proceedings were instituted. (R. 336.) Sampson states that he does not hold such an option in his own name nor in the name of the Hines Realty Company, but does not state whether or not he holds it through the Albany Park Safe Deposit Vault Company, of which he is sole stockholder or through some other company. (R. 315.) Goldstein does not deny the existence of the option to Sampson nor the leasing of the property to him, nor that he has collected and cashed for his own account the rent checks. He states that he is holding the rent monies collected under the lease made in October 1941 subject to the "notice" mentioned above served on him in April 1940. (R. 261.) Goldstein makes no claim that he ever was authorized to act for Johnson as agent in the management of this property. He admits that he has never made any report to Johnson concerning its rental and has never advised Johnson of the fact that it was rented or tendered any of the rents to him (R. 253.)

Miss Sommer, former employee of Goldstein, swore that Goldstein caused income statements of this property to be

prepared monthly, in his office, and forwarded to Skidmore. (R. 165.) (Goldstein denies this R. 254.) Miss Marsh, another employee, swore that service bills on the property were by her, at Goldstein's instructions, sent to Sampson. (R. 164, 165).